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No.

IN THE

Supreme Court of the United States

UNITED STATES *EX REL.* MICHAEL G. NEW,
Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, AND
FRANCIS J. HARVEY, SECRETARY OF THE ARMY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case involves the court-martial of former Army Specialist, Michael G. New, on a charge of disobedience of a lawful order. New was convicted and sentenced to a bad conduct discharge after the military judge ruled that the lawfulness of the order was not an element of the offense and need not be proven beyond a reasonable doubt — a ruling that one judge on the Court of Appeals for the Armed Forces described as "a radical departure from our political, legal and military tradition." New's attempts to obtain collateral review of his conviction by an Article III court in accordance with constitutional standards thus far have been unsuccessful, presenting the following questions for review with respect to the decision below of the U.S. Court of Appeals for the D.C. Circuit.

1. Did the court of appeals, in abandoning D.C. Circuit precedent and applying a "fair consideration" standard of review with respect to the due process claims set forth in petitioner's complaint collaterally attacking his court-martial conviction, apply an incorrect standard of review in conflict with decisions of other United States courts of appeals?

2. Should this Court reconsider and modify, or even overrule, the "full and fair consideration" standard of review governing collateral attacks on court-martial convictions established in Burns v. Wilson, 346 U.S. 137 (1953)?

3. Did the court of appeals, in upholding dismissal of petitioner's claim — that his due process right to proof beyond a reasonable doubt of every fact constituting the offense defined in 10 U.S.C. Section 892(2) was violated by a court-martial ruling that "lawful" was not an element of the offense defined therein — sanction the denial of due process to petitioner in a way that conflicts with relevant decisions of this Court?

4. Did the court of appeals, in upholding dismissal of petitioner's claim -- that his due process right to a complete defense was denied by a court-martial ruling that the alleged illegality of the Macedonian deployment (for which the order to wear the prescribed United Nations uniform was prescribed) was a nonjusticiable political question — sanction the denial of due process to petitioner in a way that conflicts with relevant decisions of this Court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, former Army Specialist Michael G. New, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the decision of the United States District Court for the District of Columbia granting respondents' motion to dismiss New's collateral attack on his 1996 court-martial conviction for failure to state a claim upon which relief can be granted.

OPINIONS BELOW

On December 22, 2004, the district court granted respondents' motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure ("F.R.Civ.P."). United States *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80 (D.D.C. 2004) (Appendix ("App.") 15a). On May 23, 2006, the court of appeals affirmed. United States *ex rel.* New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006) (hereinafter "New v. Rumsfeld") (App. 1a). On August 17, 2006, the court of appeals denied New's petition for rehearing en banc (App. 54a).

JURISDICTION

The district court and the court of appeals had subject matter jurisdiction of New's collateral attack on his court-martial conviction under 28 U.S.C. Section 1331. *See* Schlesinger v. Councilman, 420 U.S. 738, 748-53 (1975). This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment (App. 133a), the Thirteenth Amendment (App. 134a) and the commander in chief and appointment provisions

of Section 2 of Article II (App. 132a) of the United States Constitution.

TREATY PROVISIONS INVOLVED

This case involves Chapters VI and VII of the United Nations Charter (App. 135a, 138a).

STATUTES AND REGULATIONS INVOLVED

This case involves Articles 51 and 92(2) of the Uniform Code of Military Justice ("UCMJ") (10 U.S.C. Sections 851 and 892(2) (App. 143a, 145a) and Sections 6 and 7 of the United Nations Participation Act ("UNPA") (22 U.S.C. Sections 287d and 287d-1) (App. 146a, 147a). It also involves Army Regulation ("AR") 670-1, "Wear and Appearance of Army Uniforms and Insignia" (App. 151a-152a).

STATEMENT OF THE CASE

This case concerns a conflict among the circuits with respect to the standard of review to be applied by an Article III court to a motion to dismiss a complaint, collaterally attacking a court-martial conviction and sentence, for failure to state a claim upon which relief can be granted under Rule 12(b)(6), F.R.Civ.P. This case also concerns whether petitioner's complaint states actionable claims that his court-martial for violation of 10 U.S.C. Section 892(2) denied petitioner his liberty without due process of law.

In order to present his concerns to this Court, petitioner details herein his diligent efforts over an 11-year period to obtain meaningful Article III judicial review of his court-martial for refusing to obey an unlawful order. Thus far, the Government has been equally diligent, yet more successful, in blocking such

judicial scrutiny. To be sure, New has presented his case to lower courts on numerous occasions, yet his core claims have been sidestepped, and applicable precedents disregarded. This petition for writ of certiorari represents a final effort to preserve the process due an Armed Forces service member who believes that he has performed his duty to obey only lawful orders.[1]

1. The Court-Martial.

On October 17, 1995, then-Army Specialist Michael G. New ("New") was charged with having knowingly disobeyed a lawful order, namely, "to wear the prescribed uniform for the deployment to Macedonia, *i.e.*, U.N. patches and cap." *See* Second Amended Complaint ("2d Compl.") ¶ 8 (App. 172a). On January 24, 1996, New was convicted and sentenced to a bad conduct discharge. *Id.*

At his court-martial, New's principal defense was that the order to wear the U.N. uniform was unlawful. 2d Compl. ¶¶ 9-11 (App. 172a-174a). Yet, over New's Fifth Amendment Due Process objection, the military judge ruled that the lawfulness of the uniform was not an element of the offense charged to be proved beyond a reasonable doubt to the military jury, but an issue of law for the judge. 2d Compl. ¶¶ 18-19 (App. 176a-177a). Further, the military judge ruled that New's challenges to the unlawfulness of the order based on the legality and constitutionality of the Macedonian deployment for which the U.N. uniform had been prescribed were nonjusticiable political questions. 2d Compl. ¶¶ 9, 10, 16 (App. 172a-173a, 175a-176a). On appeal, the Army Court of Criminal Appeals ("ACCA") and

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[1] *See* Statement of Chairman of the Joint Chiefs of Staff: "[I]t is the absolute responsibility of everybody in uniform to disobey an order that is either illegal or immoral." http://www.jcs.mil/chairman/speeches/060217NatPressClubLunch.html (February 17, 2006).

the United States Court of Appeals for the Armed Forces ("CAAF") affirmed. *See* United States v. New, 50 M.J. 729 (1999), and United States v. New, 55 M.J. 95 (2001) (App. 55a), respectively.

2. Initial Habeas Corpus Petition.

On January 16, 1996, eight days before his court-martial conviction, New filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia, and a motion to stay his court-martial. The motion was denied, and the court-martial proceeded to trial. In the meanwhile, the district court ordered the Government to respond to New's habeas petition.

On March 28, 1996, the district court ruled against New solely on the ground of "comity," having concluded that: (a) "the quality of justice in the military tribunals is [not] inferior to that which is provided by Article III courts"; and (b) "[o]nce the military proceedings are completed, ... New may ... move to reopen this proceeding." United States *ex rel.* New v. Perry, 919 F. Supp. 491, 500 (D.D.C. 1996).

On November 25, 1997, the U.S. Court of Appeals for the District of Columbia Circuit affirmed on the ground that "New has failed to exhaust his remedies for relief in the pending court-martial action." New v. Cohen, 129 F.3d 639, 648 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998). In so ruling, the court of appeals observed that, while New's bad conduct discharge "foreclosed" a collateral attack by means of a habeas corpus petition, New "may be able" to obtain Article III court review pursuant to 28 U.S.C. Section 1331, citing Kauffman v. Secretary of the Air Force, 415 F.2d 991, 994 (D.C. Cir. 1969). *See* New v. Cohen, 129 F.3d at 648.

3. Habeas Proceeding Reopened.

On May 8, 2002, following unsuccessful appeals to ACCA and CAAF, and an unsuccessful petition for review by this Court,[2] New filed a motion to reopen his 1996 habeas corpus proceeding with leave to file an amended and supplemental petition for a writ of habeas corpus collaterally attacking his court-martial conviction and sentence. On June 18, 2002, the district court granted New's motion to reopen, allowing him to file an amended complaint "which sets forth an appropriate jurisdictional basis and sufficient facts upon which to sustain his claim," but denied his motion to file an amended habeas petition. On July 1, 2002, New filed his amended complaint, withdrawing his allegation of jurisdiction pursuant to 28 U.S.C. Section 2242, and substituting therefor allegations of jurisdiction resting upon 28 U.S.C. Sections 2241, 1331, 1361 and 2201. On March 17, 2004, New filed a Second Amended Complaint (App. 170a), waiving his right to seek damages under the Tucker Act, and continuing to rely on 28 U.S.C. Section 1331 to establish jurisdiction of his nonhabeas collateral attack, as provided in Kauffman v. Secretary of the Air Force, *supra.* *See* United States. ex. rel. New v. Rumsfeld, 350 F. Supp. 2d 80, 87 (App. 21a-22a).

4. Current Collateral Attack.

Counts I and II of New's Second Amended Complaint invoked the Kauffman ruling that the test of "fairness" set out by the Supreme Court in Burns v. Wilson, 346 U.S. 137 (1953), "requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." Kauffman, 415

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[2] *See* United States v. New, 55 M.J. 95, *cert. denied*, 534 U.S. 955 (2001).

F.2d at 997. Accordingly, in **Count I** of his Second Amended Complaint, New alleged that CAAF's ruling that lawfulness was not an element of the offense defined in 10 U.S.C. Section 892(2) — which prohibits failure to obey "any ... **lawful** order issued by a member of the armed forces" (emphasis added) — denied him "his liberty and property without due process of law, **contrary to the due process standards set forth by the U. S. Supreme Court** in Gaudin v. United States, 515 U.S. 506 (1995) and in Jackson v. Virginia, 443 U.S. 307 (1979)." (Emphasis added.) 2d Compl. ¶¶ 39-41 (App. 181a). In **Count II**, New alleged that CAAF's ruling that New's defense — that the order which he was charged of disobeying was unlawful because the deployment for which it had been issued was unlawful — was a nonjusticiable political question "did not conform to Supreme Court standards" governing political questions, and, as a consequence, New was "denied the right to contest the prosecution's case against him ... **contrary to the Due Process standards of the United States Constitution, as set forth and confirmed by the U.S. Supreme Court** in Crane v. Kentucky, 476 U.S. 683 (1986), and Simmons v. South Carolina, 521 U.S. 154 (1994)." (Emphasis added.) 2d Compl. ¶¶ 42-44 (App. 182a).

5. Complaint Dismissed for Failure to State a Claim.

When respondents moved to dismiss New's Second Amended Complaint, under Rule 12(b)(6), F.R.Civ.P., the district court purported to examine its legal sufficiency according to the standard of review set forth in Kauffman:

> Noting that the Supreme Court has "never clarified the standard of full and fair consideration, and it has meant many things to many courts," the D.C. Circuit held [in Kauffman] that the "test of fairness requires that military rulings on constitutional issues conform to Supreme Court

> standards, unless it is shown that conditions peculiar to military life require a different rule".... [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d at 89.] (App. 27a).

Notwithstanding the Rule 12(b)(6) admonition to construe New's complaint liberally in his favor, and notwithstanding the explicit reference in Count I to the **Fifth Amendment** due process clause, the district court **misread Count I** as having stated a claim that "the military judge's failure to submit the [lawfulness of the order] violated petitioner's **Sixth Amendment right to jury trial."** New v. Rumsfeld, 350 F. Supp. 2d at 92 (App. 32a-33a) (emphasis added). Citing Supreme Court cases holding that the Sixth Amendment jury trial right does not apply to courts-martial, the court summarily dismissed Count I of the complaint. *See id.*, 350 F. Supp. 2d at 92-93. (App. 33a).

As for Count II, the district court criticized the military courts for not conforming to Supreme Court standards governing political questions, having "improperly aggregated all of [New's] claims of illegality under the rubric of a 'challenge to the President's use of Armed Forces," instead of "consider[ing] individually the justiciability of each of petitioner's specific challenges to the deployment order." *Id.* at 96. (App. 39a). Nevertheless, the district court dismissed New's claim — stating that the political question doctrine "does not exist to protect or advantage government litigants," even though the court acknowledged that the doctrine "works to the government's benefit in this case ... prevent[ing] the normal presumption of a military order's lawfulness from being rebutted." *Id.*, 350 F. Supp. 2d at 95. (App. 38a). The district court failed to address New's due process claim that the wrongful invocation of the political question doctrine had deprived New of his due process right to a "complete defense," contrary to Supreme Court

standards. *See id.*, 350 F. Supp. 2d at 93-101. (App. 34a-50a).

6. Appeal to the U.S. Court of Appeals for the D.C. Circuit.

New's appeal to the U.S. Court of Appeals for the D.C. Circuit challenged the district court's misconstruction of Count I of his complaint as one alleging a Sixth Amendment jury trial claim. Pointing to explicit language referring to the Fifth Amendment due process clause in Count I, New argued not only that the district court failed to liberally construe the complaint's allegations, but that it also was mistaken when it stated that "[w]ithout the jury trial guarantees of the Sixth Amendment ... due process alone is insufficient to give [New] what he seeks." *See* New v. Rumsfeld, 350 F. Supp. 2d at 93, n.8. (App. 33a).

Further, New contended that in both the Gaudin and Jackson cases cited in Count I, the Supreme Court had recognized that the Fifth Amendment due process requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of jury trial, while interrelated, are independently rooted. As New pointed out, the Supreme Court first laid down the Fifth Amendment due process requirement of proof beyond a reasonable doubt in a juvenile proceeding which — like a court-martial — is not subject to the Sixth Amendment right to jury trial. *See* In re Winship, 397 U.S. 358, 364 (1970), and McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

As for Count II, New contended that, although the district court had correctly ruled that the military courts had failed to apply the Supreme Court's standards governing political questions, it erroneously had failed to address whether the military courts' invocation of the political question doctrine had denied New's due process right to contest the prosecution's case against him, as guaranteed by Crane v. Kentucky, *supra*, and

Simmons v. South Carolina, *supra*. New App. Br., pp. 31-35, Docket No. 05-5023, U.S. App. D.C. Further, New contested the district court's resolution of New's fourfold legal and constitutional objections to the Macedonian deployment, with special emphasis upon the district court's erroneous disposition of New's claims under the United Nations Participation Act, which contains judicially enforceable rules limiting the power of the President to deploy American armed forces members into service of the United Nations. New App. Br., pp. 35-40, Docket No. 05-5023, U.S. App. D.C.

7. The Court of Appeals Panel Opinion.

The court of appeals affirmed the district court, concluding that the military courts had given "fair consideration" to New's due process claims. *See* New v. Rumsfeld, 448 F.3d 403, 408-11 (D.C. Cir. 2006) (App. 1a, 7a-14a). With respect to Count I of his complaint, the panel disregarded New's allegations that the parties had stipulated that the U.N. uniform was generally unauthorized, and that the prosecution had utterly failed to prove its contention that the U.N. uniform in this case was justified by an exception allowing "foreign insignia" as a safety measure in a maneuver area. *Compare id.*, 448 F.3d at 405, 409 (App. 2a-3a, 9a-11a) *with* 2d Compl. ¶¶ 14-16 (App. 174a-176a). The panel effectively relieved the prosecution of its burden to show that the U.N. uniform fit within this "safety exception," placing the burden upon New to show otherwise. *See* New v. Rumsfeld, 448 F.3d at 409-10 (App. 9a-11a). Having done so, the panel then found "no fundamental defect in [CAAF's] consideration of the issue." *Id.*, 448 F.3d at 410 (App. 11a).

In like manner, the panel did not review New's allegations in Count II of his complaint that the failure of the military courts to abide by Supreme Court standards governing political questions had prevented New from contesting the lawfulness of the order

on the ground that the deployment for which the order was issued was unlawful. *See id.*, 448 F.3d at 410-11 (App. 11a-14a). Rather than making an independent determination that invocation of the political question doctrine conformed with Supreme Court standards (a) governing such questions or (b) insuring the due process right to a complete defense — as alleged in New's complaint — the panel simply asserted that "the military courts' use of the political question doctrine deserves deference...." *Compare id.*, 448 F.3d at 410 (App. 12a) *with* 2d Compl. ¶¶ 42-44 (App. 182a).

8. Petition for Rehearing En Banc.

New's petition for a rehearing en banc brought to the entire court's attention that the "fair consideration" standard of review applied by the panel to New's collateral attack on his court-martial conviction had been specifically rejected as "vague and watered-down" in Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969). Petition for Rehearing En Banc by Appellant Michael G. New ("New Rehear. Pet."), pp. 1, 8 (App. 153a, 160a). New further documented that the Kauffman standard — military court rulings on constitutional questions must "conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule" — was the prevailing rule in the D.C. Circuit. New Rehear. Pet., pp. 8-10 (App. 160a-162a). And New demonstrated that the panel had adopted a different standard, without discussion of Kauffman and in utter disregard of the impact that its deviation from the Kauffman rule actually placed upon New, and would place upon litigants in the future. New Rehear. Pet., pp. 10-11 (App. 165a-166a).

On August 17, 2006, the court of appeals denied New's petition for rehearing en banc. (App. 54a.)

REASONS FOR GRANTING THE WRIT

I. The Standard of Review Applied by the Court of Appeals to New's Collateral Attack on His Court-Martial Conviction Conflicts with the Standards of Review Applied by Other Courts of Appeals, Calling for the Exercise of this Court's Supervisory Power to Settle an Important Federal Question.

Only four years ago, then-Circuit Judge Samuel Alito observed that "[t]he degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear." Brosius v. Warden, 278 F.3d 239, 242 (3d Cir. 2002). "Nearly 50 years after it was decided," he further noted, this "Court's decision in Burns v. Wilson, 346 U.S. 137 ... (1953) is still the leading authority." *Id.*, 278 F.3d at 242-43. Yet, after all these years, he declared, "[l]ower courts have had difficulty applying the Burns 'full and fair' test," citing the District of Columbia Circuit Court's comment in Kauffman v. Sec. of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969), that Burns "'has meant many things to many courts.'" Brosius, 278 F.3d at 243.

A. Conflict among the Circuits.

In the 37 years since Kauffman, the Burns "full and fair consideration" test has continued to mean "many things to many courts."[3] After conducting its own review of the Burns decision,

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[3] Only the Second, Fourth, Sixth and Seventh Circuits appear to have escaped the unenviable task of having to interpret and apply the Burns test. *See* Kasey v. Goodwyn, 291 F.2d 174, 178 (4th Cir. 1961); Baker v. Schlesinger, 523 F.2d 1031, 1035 (6th Cir. 1975); and Chandler v. Markley, 291 F.2d 157, 160 (7th Cir. 1961). There appears to be no court of appeals opinion in the Second Circuit. *See* J. Theuman, "Review by Federal Civil

the Kauffman court concluded that its "full and fair" test "requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Id.*, 415 F.2d at 997. Until now, this rule has prevailed in the District of Columbia Circuit and has been applied by at least one district court in the Second Circuit. *See, e.g.*, Avrech v. Secretary of State, 477 F.2d 1237 (D.C. Cir. 1973), *rev'd on other grounds*, 418 U.S. 676 (1974); Cothran v. Dalton, 83 F. Supp. 2d 58, 64 (D.D.C. 1999); and New v. Rumsfeld, 350 F. Supp. 2d at 89 ("The governing precedent in this Circuit is Kauffman....") (App. 26a). *See also* Melvin v. Laird, 365 F. Supp. 511, 516 (E.D.N.Y. 1973).

By contrast, the courts of appeals in the First, Third, Eighth, and Ninth Circuits have concluded that the Burns rule left the door open for an independent review of constitutional legal claims made in a collateral attack on a court-martial conviction, even though such claims had received "full and fair consideration" in the military courts. *See* Allen v. VanCantford, 436 F.2d 625, 629-30 (1st Cir. 1971); Levy v. Parker, 478 F.2d 772, 779-83 (3d Cir. 1973), *rev'd on other grounds sub nom.* Parker v. Levy, 417 U.S. 733 (1974); Harris v. Cicone, 417 F.2d 479, 481 (8th Cir. 1966); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1380 (9th Cir. 1981). In the Eighth and Ninth Circuits, however, this rule appears not to have been followed

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Courts of Court-Martial Convictions — Modern Status," 95 A.L.R. Federal 472, 526-27 (1989). *See also* J. Chapman, "Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review," ("Reforming Habeas Review"), 57 *Vanderbilt L. Rev.* 1387, 1399-1402 (2004).

consistently, leading one commentator to conclude that the courts in those circuits employ "an ad hoc approach."[4]

In the Federal Circuit, the court of appeals has endorsed the Court of Federal Claims' interpretation of Burns, deferring to the "full and fair consideration" of factual claims by the military courts, but conducting an independent examination of "serious" constitutional legal claims irrespective of whether such legal claims were fully and fairly considered by the military courts. *See* Bowling v. United States, 713 F.2d 1558, 1560-61 (Fed. Cir. 1983), *affirming* Bowling v. United States, 552 F. Supp. 54, 56-58 (Cl. Ct. 1982). This fact/law dichotomy was first launched in the Tenth Circuit in Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967), where the U.S. Court of Appeals announced that it had "jurisdiction to determine whether the accused was denied any basic right guaranteed to him by the Constitution," unless "the constitutional issue involves a factual determination, [where] our inquiry is limited to whether the military court gave full and fair consideration to the constitutional questions presented." *Id.*, 377 F.2d at 342.

In 1990, in Dodson v. Zelez, 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Court of Appeals for the Tenth Circuit abandoned the Kennedy fact/law dichotomy, joining with the en banc decision of the Fifth Circuit which had construed the "full and fair" test in Burns to require application of an elaborate "four-prong test," weighing in each case: (1) the substantiality of the constitutional claims; (2) the nature of the dispute, whether it be

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[4] *See* J. Chapman, "Reforming Federal Habeas Review," 57 *Vanderbilt L. Rev.* at 1400. *Compare* Harris v. Cicone, 417 F.2d at 481 *with* Swisher v. United States, 354 F.2d 472, 476 (8th Cir. 1966). *Compare also* Hatheway, 641 F.2d at 1380 and Daigle v. Warner, 490 F.2d 358, 364-66 (9th Cir. 1974) *with* Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972) and Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962).

fact or law; (3) the special needs, if any, of the military; and (4) the consideration given to the claim by the military courts. *See* Calley v. Calloway, 519 F.2d 184, 199-203 (5th Cir. 1975). *See also* J. Chapman, "Reforming Habeas Review," 57 *Vanderbilt L. Rev.* at 1400.

In his Brosius opinion, Judge Alito acknowledged that the Tenth Circuit "has the most experience with habeas petitions filed by service members due to the location of the Disciplinary Barracks at Ft. Leavenworth, Kansas," but he and his two colleagues declined to follow its lead. After "abandon[ing] any hope of extracting a rule,"[5] from Burns, the Brosius court pioneered its own "unique"[6] approach:

> Whatever Burns means ... our inquiry in a military habeas case may not go further than our inquiry in a state habeas case.... Thus, we will **assume — but solely for the sake of argument** — that we may review determinations made by military courts **in this case** as if they were determinations made by state courts. Accordingly, we will **assume** that 28 U.S.C. § 2254(e)(1) applies to findings of historical fact made by the military courts [and] in considering other determinations made by the military courts, we will **assume** that 28 U.S.C. § 2254(d) applies. [Brosius, 278 F.3d at 245 (emphasis added).]

To add to the confusion and conflict, the panel in the instant case fashioned its own unique twist on Burns. The panel (a) ignored completely the Kauffman rule, even though it has

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[5] *See* J. Chapman, "Reforming Federal Habeas Review," 57 *Vanderbilt L. Rev.* at 1401-02.

[6] *Id.* at 1401.

been the ruling precedent in the District of Columbia Circuit,[7] (b) dismissed summarily the four-factor test for "explicit review for constitutional violations," even though rendered by the full court of appeals in the Fifth Circuit,[8] and (c) brushed aside the Brosius effort including a definitive set of standards to harmonize the collateral attacks on court-martials with the statutory standards afforded state convictions review.[9] Instead, the panel invented an entirely new rule, purporting to apply "*Burns's* 'fair consideration'" test, but limiting its application to "non-habeas review ... of military judgments." *See* New v. Rumsfeld, 448 F.3d at 408 (App. 7a).

To reach this conclusion, the panel omitted from its discussion of Burns any reference to the paragraph in the Burns plurality decision that called for a review of the record to ascertain whether "a military decision has dealt **fully and fairly with an allegation in** [an] application" for habeas corpus. *Compare* New v. Rumsfeld, 448 F.3d at 407-08 (App. 5a-7a) *with* Burns v. Wilson, 346 U.S. at 142-44 (emphasis added). Instead, the panel transformed the Burns "full and fair" test into a meagre "fair consideration" one in a non-habeas collateral attack. *See* New v. Rumsfeld, 448 F.3d at 408 (App. 7a).

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[7] *Compare* New v. Rumsfeld, 448 F.3d at 406-08 (App. 4a-7a) *with* New v. Cohen, 129 F.3d 639, 648 (D.C. Cir. 1997); Homey v. Resor, 455 F.2d 1345, 1349 (D.C. Cir. 1971); Owings v. Secretary of the Air Force, 447 F.2d 1245, 1261 (D.C. Cir. 1971); Cothran v. Dalton, 83 F. Supp. 2d 58, 63 (D.D.C. 1999); Williamson v. Secretary of the Navy, 395 F. Supp. 146, 147 (D.D.C. 1975); Staton v. Froehlke, 390 F. Supp. 503, 505 (D.D.C. 1975); Stolte v. Laird, 353 F. Supp. 1392, 1395 (D.D.C. 1972).

[8] *See* New v. Rumsfeld, 448 F.3d at 407-08 (App. 6a).

[9] *See* New v. Rumsfeld, 448 F.3d at 407-08 (App. 6a-7a).

In order to reach this unprecedented conclusion, the panel turned to this Court's opinion in Schlesinger v. Councilman, 420 U.S. 738, 753 (1975), from which it erroneously drew the lesson that "non-habeas review is if anything more deferential than habeas review of military judgments...." New v. Rumsfeld, 448 F.3d at 408 (App. 7a). But the Councilman "point" on which the three-judge panel relied did **not** draw a distinction between the standard of review in habeas and nonhabeas collateral attacks. Rather, Councilman's holding spoke only to the difference between the jurisdictional bases of the two proceedings. *Id.*, 420 U.S. at 750-53. Indeed, the Councilman court did not even address the merits of the constitutional claim, refraining on the equitable ground that the petitioner had failed to exhaust his "remedies in the military system." *Id.*, 420 U.S. at 758-59.

Remarkably, the panel apparently found no opinion supporting its view that Councilman ushered in a more deferential standard of review governing collateral attacks on court-martial convictions, because the petition did not meet the "custody" requirements of a habeas corpus petition. *See* New v. Rumsfeld, 448 F.3d at 406-08 (App. 4a-7a).[10] Instead, by drawing a distinction between habeas and nonhabeas collateral attacks, the panel decision in this case has added to the conflict over Burns among the circuits. Additionally, it has created confusion within the District of Columbia Circuit, a confusion that the entire appellate court refused to address in response to New's petition for rehearing en banc.

B. Confusion Within the District of Columbia Circuit.

As New pointed out in his brief in support of his petition for rehearing en banc, the panel ruling applying its version of the

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[10] *See also* J. Theuman, "Review by Federal Civil Courts of Court-Martial Convictions — Modern Status," 95 ALR Federal 472, 524-41 (1989).

Burns "fair consideration" test directly contradicts Kauffman. New Rehear. Pet., pp. 6-11 (App. 159a-164a). First, like New's collateral attack, the collateral attack in Kauffman was a nonhabeas proceeding. *See* Kauffman, 415 F.2d at 995. Second, the Kauffman court, after careful review of "full and fair" consideration language in Burns, rejected that test, dismissing it as "a vague and watered-down standard," totally inadequate to confer the "benefits of collateral review of military judgments ... [in] civilian courts." *See* Kauffman, 415 F.2d at 997. Third, the panel's idiosyncratic "fair consideration" test undermines the Kauffman standard that dictates independent judicial "review [of] constitutional rulings of [military courts to] find [whether] the[y] [are] correct by prevailing Supreme Court standards." *See id.*

The panel's inexplicable refusal not only to adhere to the Kauffman standard, but to ignore it altogether, undermines the Kauffman precedent, leaving it on the books without guidance to future litigants on how to evaluate and then compose a nonhabeas collateral attack complaint, and without guidance to the district court judges in the District of Columbia Circuit on how to appraise the sufficiency of such a complaint on a motion to dismiss under Rule 12(b)(6), F.R.Civ.P., or the merits of any claim in such a complaint on a motion for summary judgment under Rule 56, F.R.Civ.P. Furthermore, the panel decision has prejudiced New who, in reliance on the Kauffman standard, wrote Counts I and II of his complaint. *See* 2d Compl., ¶¶ 37, 41 and 44 (App. 180a-182a). By assessing the legal sufficiency of New's complaint by its extremely deferential application of its modified "fair consideration" test in the D.C. Circuit, the three-judge panel applied a standard to New's complaint that had been explicitly repudiated in Kauffman. Such an *ex post facto* application of a previously discarded standard is unfair and

unjust,[11] highlighting the need for the exercise of this Court's supervisory power to settle this important federal question.

C. Burns v. Wilson Should Be Reconsidered.

As the Third Circuit panel in Brosius noted, the Burns "full and fair" consideration test was not the product of a "majority opinion." Brosius, 278 F.3d at 243. As the panel also observed, Justice Frankfurter "did not vote to affirm or reverse but stated the Court should have put the case down for reargument." *Id.*, 278 F.3d at 243, n.1. Indeed, Justice Frankfurter implored his colleagues to give the case more serious consideration:

> It is my view that this is not just a case involving individuals. Issues of far-reaching import are at stake which call for further consideration. They were not explored in all their significance in the submissions made to the Court. [Burns v. Wilson, 346 U.S. at 149-50].

After the Court had denied a motion for rehearing, Justice Frankfurter again expressed his concerns, this time even more strongly:

> Fundamental issues which have neither been argued by counsel nor considered by the Court are ... involved. On such important questions, the military authorities, the bar, and the lower courts ... ought not to be left with the **inconclusive determination which our disposition of the case ... implies**. [*Id.*, 346 U.S. at 844 (emphasis added)].

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[11] *See* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 679-82 (1930).

Additionally, Justice Frankfurter claimed that the plurality's "assertion that 'in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases' ... is ... **demonstrably incorrect.**" *Id.* (emphasis added).

Justice Frankfurter's admonition and critique have proved prophetic. In 1975, for example, citing Burns, the Government urged the U.S. Court of Appeals for the Fifth Circuit to limit its review to "a determination that the military courts have fully and fairly considered [Lieutenant William] Calley's claims" of constitutional deficiencies in his collateral attack on his court-martial conviction for the "premeditated murder ... of not less than 102 Vietnamese civilians at My Lai...." Calley v. Calloway, 519 F.2d 184, 190, 194 (5th Cir. 1975). Sitting en banc, the Court of Appeals refused. After conducting a careful review of the history of collateral review of courts-martial — both habeas and nonhabeas, and pre- and post-Burns (*id.* 519 F.2d at 194-203) — the full appellate court concluded that the Burns decision bequeathed a problematic and uncertain standard of review. *See* Calley, 519 F.2d at 198 and 198, n.20. It was problematic because, as Justice Frankfurter had "substantiated" in Burns, one of its premises — "that in 'military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases' — was "historical[ly] inaccura[te]." Calley, 519 F.2d at 198 n.20. It was "uncertain" because courts have both limited their inquiry to "whether the military courts fairly considered the petitioner's claims," and broadened their inquiry to apply the same standard as applied to civilian cases, "unless it is shown that conditions peculiar to military life require a different rule. Kauffman...." *Id.*, at 198, n.21.

Because Burns sounded such an uncertain trumpet, the Fifth Circuit concluded that it was necessary to reformulate the

standard of review. *See* Calley, 519 F.2d at 228-29. But neither the entire Fifth Circuit's reformulation, nor any other effort by a court of appeals, can solve the conflicts and confusions created by the Burns decision. Only this Court is able to do that. And, after over 50 years of futility in the lower courts, it is time for this Court to clarify the standard of review governing collateral attacks on court-martial convictions.

II. New's Due Process Claims Were Resolved by the Courts below in a Way That Conflicts with Relevant Decisions of this Court.

This case came to the U.S. Court of Appeals for the District of Columbia on appeal from the district court's ruling dismissing New's collateral attack on his court-martial conviction for failure to state a claim upon which relief can be granted. According to the rule governing appeals from the grant of a motion under Rule 12(b)(6), F.R.Civ.P., the court of appeals was duty-bound to "read the facts alleged in the complaint in the light most favorable" to New. *See* H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249 (1989). According to his complaint, and in reliance on a Stipulation of Fact, New alleged that the U.N. uniform was an "unauthorized" foreign insignia, violative of both statute and regulation. *See* 2d Compl. ¶¶ 11, 14 (App. 173a-175a). Further, according to the complaint, the prosecution claimed that the U.N. uniform in this case met an **exception** to the rule that the uniform was unauthorized, and it was the prosecution that then argued (without introducing any evidence) that the U.N. uniform was justified as a "safety" measure in a "maneuver" area. *See* 2d Compl. ¶ 15 (App. 175a).

The court of appeals not only failed to read these allegations in the complaint, as it was duty-bound to do; it actually ignored them, erroneously asserting that "New's defense focused on the lawfulness of the order — specifically its consistency with Army

Regulation 670-1 ... which permits commanders to require uniform modifications "to be worn within [a] maneuver area"... or when safety considerations make it appropriate." New v. Rumsfeld, 448 F.3d at 405 (App. 2a). By misstating New's defense, the court of appeals erroneously assumed that the U.N. uniform was presumed to have been lawful as a "safety" measure, and that New had failed to rebut that presumption. *See id.*, 448 F.3d at 409-10 (App. 9a-11a). In fact, however, **the presumption was rebutted by a stipulation of the parties** that was entered into evidence. See 2d Complaint, ¶14 (App. 175a). As CAAF Judge Sullivan's observed in his opinion in United States v. New, once the presumption was rebutted, the prosecution was compelled to make the "safety" claim in light of the fact that the defense produced "some evidence that [the] order to wear UN badges was **'patently illegal'** because it **'directed the commission of a crime.'**" *Id.*, 55 M.J. at 127 (App. 123a) (emphasis added). Indeed, as Judge Sullivan concluded, "the Government must prove the lawfulness of the disobeyed order [to don a proscribed uniform] without the benefit of the inference of lawfulness" that would have otherwise arisen from the presumption that a military order is lawful. *Id.* (App. 124a).

However, the court of appeals ignored New's allegations in the complaint in disregard of this Court's rule that a complaint should not be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[12] And the court of appeals utterly **failed to address** New's fundamental claim that he had been denied due process of law at his court-martial by the military judge's ruling that the factual issues underpinning **the alleged lawfulness of the order to wear the U.N. uniform, under the**

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[12] H.J., Inc. v. Northwestern Bell Tele. Co., 492 U.S. at 249-50.

exception which had been raised by the prosecution, need not be proved beyond a reasonable doubt to the military jury. *See* 2d Compl. ¶¶ 17-24 (App. 176a-178a).

A. By Erroneously Ruling that Lawfulness Was Not an Element of the Offense of Disobeying of a "Lawful" Order, the Military Courts Denied Mr. New His Due Process Right that Every Fact Constituting the Offense Charged Against Him Be Proved Beyond a Reasonable Doubt.

Fully 36 years ago, this Court confronted the question whether the rule that the Government prove a "criminal charge beyond a reasonable doubt" was constitutionally mandated and, if so, whether that guarantee should be extended to a juvenile proceeding in which a person was charged with the commission of an act which, if committed by an adult, was a crime. *See* In re Winship, 397 U.S. 358, 362, 365 (1970). The Court answered both questions in the affirmative, ruling that "the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of **every fact** necessary to constitute the crime with which he is charged." *Id.*, 397 U.S. at 364, 368 (emphasis added).

This case presents for decision the question whether this well-settled constitutional due process standard of proof beyond a reasonable doubt applies to courts-martial. Must the military prosecution prove beyond a reasonable doubt "every fact necessary to constitute" a violation of an offense defined by the UCMJ? CAAF Judge Sullivan asserted[13] that 10 U.S.C. Section

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[13] *See* United States v. New, 55 M.J. at 118 (App. 103a). ("[A] military accused has a codal and constitutional right to have members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense

851(c) codifies this constitutional due process principle by requiring the military judge to instruct the military jury "as to the elements of the offense and charge" and:

> (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;
> (2) that ... if there be reasonable doubt as to the guilt of the accused the doubt must be resolved in favor of the accused and he must be acquitted;
> ...
> (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States. [*Id.*]

In New's court-martial, however, the military judge violated this constitutional and statutory mandate by ruling that the "lawfulness" of an order was **not** an element of the offense of disobedience of a "lawful" order, even though the charge against New specified, in the language of 10 U.S.C. Section 892(2), that he, "having knowledge of a **lawful** order ... which it was his duty to obey, did ... fail to obey the same." *See* 2d Compl. ¶ 3 (App. 170a-171a).

On appeal to CAAF, by a vote of three to two, a narrow majority affirmed this strained construction, ruling that "lawfulness of an order ... is not a discrete element of an offense under [10 U.S.C. Section 892(2)]." United States v. New, 55 M.J. at 100 (App. 64a). Rather, it found that the word "lawful," as it appears in the statute, is mere "surplusage," providing only an "opportunity for the accused to challenge the validity of the ... order" as a matter of law before the military judge, thereby

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with which he is charged.") (Sullivan, J., concurring in the result).

relieving the prosecution from having to prove lawfulness beyond a reasonable doubt to the military jury. *Id.*, 55 M.J. at 105 n.7 (App. 73a).

Dissenting from this ruling, CAAF Judge Sullivan pointed out that, by so construing 10 U.S.C. Section 892(2), the CAAF majority's holding was a "radical departure from our political, legal, and military tradition." *Id.*, 55 M.J. at 115 (App. 95a). He further challenged the majority, asserting that, by erroneously construing the congressionally defined offense, dispensing with the clear language of Congress that lawfulness is an element of the offense (*id.*, 55 M.J. at 121 (App. 110-111)),[14] the majority had breached the due process standard that requires "the Government [to] prove[], beyond a reasonable doubt, each and every element of the offense of which he is charged," in direct conflict with this Court's opinions in United States v. Gaudin, 515 U.S. 506 (1995) and Sullivan v. Louisiana, 508 U.S. 275 (1993). *Id.*, 55 M.J. at 117, 118, 123-25 (App. 99a, 101a-103a, 117a-118a). Indeed, by holding that the lawfulness of an order was an interlocutory issue for the military judge,[15] the CAAF majority imposed the burden of proving the unlawfulness of the order upon New. *Id.*, 55 M.J. at 108 (App. 80a).

Unlike the lawfulness of a search or seizure which concerns factual determinations extraneous to the offense charged, the "lawfulness" of an order entails factual determinations intrinsic to the offense charged. As CAAF Judge Sullivan observed,

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[14] As CAAF Judge Sullivan pointed out: "...Congress could have enacted a statute prohibiting disobedience of orders without regard for the order's lawfulness, but chose not to do so." *Id.* (App. 111a.)

[15] As CAAF Judge Sullivan emphasized: "An interlocutory question ... is generally understood to be one that 'does not bear on the ultimate merits of the case.'" *Id.*, 55 M.J. at 122. (App. 112a.)

"there are facts at issue in this case which had to be resolved before the lawfulness of the order under the uniform regulation could be decided." United States v. New, 55 M.J. at 122 (App. 113a). Thus, in this case the military judge decided that the order to wear the U.N. uniform was "lawful" because, as a matter of fact, "the adding of U.N. military uniform accoutrements had a function specifically to enhance the safety of United States armed forces in Macedonia." 2d Compl. ¶ 17 (App. 176a). By taking the issue of lawfulness away from the military jury, the prosecution was relieved of having to prove beyond a reasonable doubt **every fact constituting the offense** with which New had been charged.

In this way, the military judge and the affirming military appellate courts neglected the "vital role" that the "reasonable doubt standard" plays in American criminal jurisprudence. According to this Court in In re Winship:

> [The reasonable doubt standard] is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence — that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law.... [A] person accused of a crime ... would be at a severe disadvantage ... amounting to a **lack of fundamental fairness** ...." [*Id.*, 397 U.S. at 363 (emphasis added).]

As CAAF Judge Sullivan observed, "facts at issue in the [New] case ... had to be resolved before the lawfulness of the order under the uniform regulation could be decided," thus indicating that the issue of lawfulness was a "mixed question of law and fact." United States v. New, 55 M.J. at 122 (App. 113a-114a). According to the CAAF majority, however, because the ultimate question of an order's lawfulness is one of "law," facts

relevant to the issue of lawfulness are part of a legal inquiry for the military judge, **not** for the military jury as an element of the offense. *See id.*, 55 M.J. at 100-102 (App. 64a-67a).

The CAAF majority's distinction between law and fact directly conflicts with this Court's ruling in United States v. Gaudin, where this Court rejected the Government's argument that "*only the factual components* of the essential elements" need be proved beyond a reasonable doubt to the jury. *Id.*, 515 U.S. at 511 (italics original). Instead, the Gaudin court ruled that its Due Process decision in In re Winship and related cases "confirm[] that the jury's constitutional responsibility is not merely to determine the facts, but to **apply the law to those facts** and draw the ultimate conclusion of guilt or innocence." Gaudin, 515 U.S. at 514.

The district court attempted to escape Gaudin, dismissing it as irrelevant, because "the Sixth Amendment right to trial by jury does not apply to courts-martial." New v. Rumsfeld, 350 F. Supp. 2d at 92 (App. 33a). But this effort was erroneous, as the Gaudin Court relied heavily upon the due process principle that the Constitution requires the Government to prove beyond a reasonable doubt "every element of the crime ... charged." *See id.*, 515 U.S. at 510. *See also* 515 U.S. at 523-24 (Rehnquist, C.J., concurring). To be sure, the due process principle of proof beyond a reasonable doubt is interrelated with the jury trial guarantee, but the former also exists independently from the latter, as evidenced by this Court's ruling in In re Winship, a juvenile proceeding which — like a court-martial — is not subject to the Sixth Amendment right to jury trial. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); Jackson v. Virginia, 443 U.S. 307, 309 (1979).

By failing to apply these due process standards to the military court's ruling that lawfulness was not an element of the offense

with which New was charged, both the district court and the court of appeals fell short of their duty to ensure that "the tenets of fundamental fairness" prevail in the administration of the UCMJ. *See* Sen. Report 98-53, pp. 2, 8-9, 10-11, 33-34 (98th Cong., 1st Sess.). And, in so doing, the courts below failed to implement this Court's precedents applying the due process guarantee of proof of every fact constituting an offense beyond a reasonable doubt.

B. By Erroneously Ruling that Mr. New's Legal and Constitutional Objections to the Military Deployment for Which the Order Was Issued Were Nonjusticiable Political Questions, the Military Courts Denied New His Due Process Right to Present a Complete Defense to the Charge Against Him.

In a court-martial for disobedience of a lawful order, a military order is presumed to be lawful. *See* United States v. New, 55 M.J. at 108, 118 (App. 80a, 102a). Unless an order is "palpably illegal upon its face," the presumption of lawfulness, if left unrebutted, greatly increases the likelihood of conviction. *See id.*, 55 M.J. at 108, 118 (App. 80a, 103a). By stipulation of fact, New introduced evidence that the U.N. patches and cap, being "foreign ... insignia," were "not [to] be worn on" a soldier's Battle Dress Uniform, pursuant to AR 670-1, ¶¶ 3-4 (App. 151a-152a). Thus, New rebutted the inference of lawfulness of the order to wear the U.N. uniform. *See* United States v. New, 55 M.J. at 127 (Sullivan, J., concurring) (App. 123a).

In response, the prosecution argued that the U.N. patches and cap were specifically authorized by AR 670-1, ¶¶ 1-18 and 2-6d (App. 150a), which together provide that a "commander in charge of a unit within [a] **maneuver** area" may require "the

wear of organizational ... items ... with the uniform when **safety** considerations make it appropriate." *See id.* (emphasis added). In order to support this claim, the prosecution was compelled to argue that the Macedonian deployment for which the uniform was "prescribed" was a "maneuver" area, and that the U.N. uniform had been prescribed as a "safety" measure in that area, "the wearing of [U.N.] blue in a hostile environment [being] the best protection one can have from the boundless chaos of warfare." *See* 2d Compl. ¶ 15 (App. 175). But there was no evidence supporting such an argument. In fact, any such evidence would have been virtually fatal to the prosecution's case — for it would have confirmed New's showing that the Macedonian deployment was an illegal "combatant" operation, having not received the specific written approval of Congress, as prescribed by the UNPA, 10 U.S.C. Section 287d (*see* 2d Compl. ¶¶ 9, 12 (App. 172a-174a)). Not surprisingly, the prosecution inconsistently refused to concede that "Macedonia is a hostile environment" while simultaneously insisting that the U.N. patches and cap were needed to protect New's unit from "combatants" in the area. *See* 2d Compl. ¶ 15 (App. 175a).

The military courts let the prosecution escape this dilemma, however, by refusing to rule on the deployment's legality and constitutionality on the ground that all of New's challenges — violation of Sections 278d and 278d-1 of the UNPA, the commander in chief and appointment provisions of Article II, Section 2 of, and the Thirteenth Amendment to, the Constitution — were nonjusticiable political questions. 2d Compl. ¶¶ 13, 16, 26, 27 (App. 174a, 176a, 178a, 179a); United States v. New, 55 M.J. at 108-09, 116 (App. 8a-83a, 97a, 99a). As the district court found, the military courts "improperly aggregat[ed] all of [New's] claims of illegality under the rubric of a 'challenge to the President's use of the Armed Forces.'" U.S. ex rel. New v. Rumsfeld, 350 F. Supp. 2d at 96. (App. 39a). Indeed, none of New's claims depended upon any of the

constitutional provisions dividing the war powers between Congress and the President. *See* 2d Compl. ¶¶ 9 and 10 (App. 172a-173a). For example, New's UNPA claims rested upon specific treaty provisions and statutory rules limiting the President's discretion to deploy American armed forces in the service of the United Nations. *See* 22 U.S.C. Section 287d and 287d-1 (App. 146a-147a; H. Rep. 79-1383, reprinted in U.S.C.C.A.N., 927, 933-34 (79th Cong., 1st Sess. 1945).

Not only did the military courts misapply this Court's political question doctrine, but they misused that "doctrine [to] prevent[] the normal presumption of a military order's unlawfulness from being rebutted." *See* U.S. ex rel. New v. Rumsfeld, 350 F. Supp. 2d at 95. (App. 38a). The military courts thus permitted the prosecution to rely upon the Macedonian deployment to justify the U.N. uniform as a "safety" measure in a "maneuver" area, while simultaneously denying New any opportunity to challenge the legality and constitutionality of that deployment. In doing so, the military courts deprived New of his constitutionally guaranteed due process right to a "meaningful opportunity to present a **complete defense**." *See* Crane v. Kentucky, 476 U.S. at 690 (emphasis added).

According to this Court's due process principles, a defendant in a criminal case has a "fundamental constitutional right to a fair opportunity to present a defense." *Id.*, 476 U.S. at 687. While the military courts obliged the prosecution in its need to rely upon the Macedonian deployment to justify an otherwise unauthorized uniform, they refused to rule on the merits of New's claims that the entire Macedonia operation violated (a) the UNPA rules governing both combatant and noncombatant operations as separately provided for by the U.N. Charter, (b) the constitutional provisions limiting the appointment and commander in chief powers of the President, and (c) the Thirteenth Amendment prohibition against

involuntary servitude. In so doing, the military courts blocked New's "ability to meet the [prosecution's] case" against him, contrary to "one of the hallmarks of due process in our adversary system." *See* Simmons v. South Carolina, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring). And the court of appeals perpetuated this error by its failure to apply this Court's due process principles to a review of New's court-martial.

CONCLUSION

As CAAF Judge Sullivan observed, "as a cadet at West Point and as a soldier," he was taught to obey "all lawful orders," but if he "believed that an order was unlawful [he] could disobey it but [he] would risk a court-martial where a **'military jury'** would either validate or reject [his] decision to disobey." United States v. New, 55 M.J. at 117 (Sullivan, J., concurring) (emphasis added) (App. 101a). If the ruling in New's court-martial is left standing, this well-established "political, legal and military tradition" (*id.*, 55 M.J. at 115) (App. 95a) will have been abandoned. By relieving the prosecution from having to prove the lawfulness of military orders beyond a reasonable doubt, and foreclosing claims on the ground of nonjusticiability, the military courts have embraced a policy that provides no judicial check or balance upon the executive discretion of superior authority — from the commander in chief in the White House to the lieutenant in the field — at the expense of the soldier, sailor, marine, or airman.

For this reason, and for the reasons stated in the body of this petition, former Army Specialist Michael G. New's petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States ex rel. Michael G. New, Appellant v. Donald H. Rumsfeld, Secretary of Defense, and Francis J. Harvey, Secretary of the Army, Appellees

No. 05-5023

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

448 F.3d 403; 2006 U.S. App. LEXIS 12736

February 16, 2006, Argued
May 23, 2006, Decided

OPINION:

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Michael G. New, formerly a medical specialist in the United States Army, was convicted by a court-martial of violating a lawful order to add United Nations insignia--a shoulder patch and a field cap--to his basic uniform. The Army Court of Criminal Appeals ("Court of Criminal Appeals") and the Court of Appeals for the Armed Forces ("Court of Appeals") affirmed. New's collateral attack charges several errors in the military courts' analysis of the lawfulness of the uniform order. Because New fails to identify fundamental defects in the military courts' resolution of his claims, we affirm the district court's denial of relief.

* * *

Shortly after he learned during the summer of 1995 that his unit would be deployed to the Republic of Macedonia as part of the United Nations Preventive Deployment Force, New voiced concerns about the lawfulness of the Army's participation in the mission. In particular, he was troubled that wearing U.N. insignia as part of his uniform would manifest an involuntary or fictional shift in his allegiance from the government of the United States to the United Nations. Although his superiors discussed these concerns with him, they failed to alleviate them.

Eventually New's battalion commander issued-and his company commander repeated-an order to begin wearing a special U.N. mission uniform at a battalion formation on October 10, 1995. The uniform consisted of the ordinary United States Army battle dress uniform plus a blue U.N. patch sewn on one shoulder and a blue U.N. cap. New reported for the formation on the scheduled date wearing a uniform that lacked these features, and his superiors immediately removed him from the formation. Although his battalion commander offered him a second chance to comply with the uniform order, New declined.

New was court-martialed and charged with violating Article 92(2) of the Uniform Code of Military Justice (codified at *10 U.S.C. § 892(2)*), which provides that any person who, "having knowledge of any . . . lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order . . . shall be punished as a court-martial may direct." New's defense focused on the lawfulness of the order--specifically its consistency with Army Regulation 670-1(1992) ("AR 670-1"), which permits commanders to require uniform modifications "to be worn within [a] maneuver area," par. 2-6d, or "when safety considerations make it appropriate," par. 1-18, and with Article I, Section 9, of the Constitution, which prohibits any

person's acceptance of, inter alia, any emolument from a foreign state without congressional consent. New also argued that the uniform order couldn't be lawful because the Army's participation in the U.N. mission was itself unlawful, asserting various statutory and constitutional grounds discussed below.

The military judge--a law officer presiding over the panel but not serving as one of its members-rejected both sets of arguments: he concluded that the order was consistent with AR 670-1 and that the legality of the deployment was a nonjusticiable political question. The court-martial sentenced New to a bad-conduct discharge.

On appeal to the Court of Criminal Appeals, New argued that the military judge erred in ruling that the lawfulness of the order was a legal question for him to decide rather than an element of the offense to be decided by the "military jury" (the term that we use, following the Court of Appeals, as shorthand for the court-martial panel). *United States v. New, 55 M.J. 95, 103 (C.A.A.F. 2001)* ("CAAF Op."); see also *id. at 117* & n.2 (Sullivan, J., concurring). And he argued that the military judge's conclusion on the merits was erroneous. The Court of Criminal Appeals rejected these claims and affirmed New's conviction and sentence. *United States v. New, 50 M.J. 729 (A. Ct. Crim. App. 1999)* ("ACCA Op."). The Court of Appeals then granted review and also affirmed. *CAAF Op., 55 M.J. at 109.*

New had filed a petition for a writ of habeas corpus in federal district court shortly before his court-martial. The district court dismissed that petition on the ground that New had failed to exhaust his remedies in the pending court-martial action, *United States ex rel. New v. Perry, 919 F. Supp. 491 (D.D.C. 1996)*, and we affirmed, *New v. Cohen, 327 U.S. App. D.C. 147, 129 F.3d 639 (D.C. Cir. 1997).* After the Court of Criminal Appeals and the Court of

Appeals both affirmed his conviction, New returned to the district court. The district court dismissed the petition, finding that each of New's challenges fell outside the scope of collateral review, raised a nonjusticiable political question, or lacked merit as a matter of law. *United States ex rel. New v. Rumsfeld, 350 F. Supp. 2d 80, 102 (D.D.C. 2004)* ("District Ct. Op."). New appeals.

* * *

We begin with jurisdiction and the related issue of the scope and standard of review. New, the government, and the district court have all assumed that jurisdiction rests on *28 U.S.C. § 2241*, which authorizes federal courts to grant writs of habeas corpus. See *District Ct. Op., 350 F. Supp. 2d at 88 n.4, 89*; Brief for Appellants at 1; Brief for Appellees at 1. But *§ 2241(c)* precludes granting the writ unless the petitioner is in custody. Upon conviction by court-martial New received a bad-conduct discharge; as he is not in custody, *§ 2241* can't supply subject matter jurisdiction. This is not fatal, however, because the Supreme Court has held that Congress didn't intend to confine collateral attacks on court-martial proceedings to *§ 2241*. *Schlesinger v. Councilman, 420 U.S. 738, 748-53, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)*. Thus the district court had subject-matter jurisdiction to hear New's collateral attack under *§ 1331* (which New's second amended complaint invoked).

The standard of our review is more tangled. In *Councilman* the Supreme Court not only confirmed jurisdiction in the absence of custody, but also said that collateral relief was barred unless the judgments were "void." *Id. at 748*. And that question "may turn on [1] the nature of the alleged defect, and [2] the gravity of the harm from which relief is sought," *id. at 753*. Specifically, the defect must be "fundamental," for "[a] judgment . . . is not rendered void merely by error." *Id. at 747*. Moreover, "both factors must be

assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress." *Id. at 753.* Because *Councilman* ultimately denied review pending the court-martial, this standard was not part of the holding, but our circuit later adopted it for non-habeas review of court-martial judgments. *Priest v. Secretary of the Navy, 187 U.S. App. D.C. 104, 570 F.2d 1013, 1016 (D.C. Cir. 1977).*

The Supreme Court pitched the *Councilman* standard as more deferential than habeas review of military judgments, which it has in turn described as no less deferential than habeas review of state court judgments. This first point was explicit in *Councilman* itself, where the Court said: "[G]rounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief." *420 U.S. at 753.* The second point is part of the Court's analysis in *Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).* There, reviewing court-martial death sentences allegedly based on coerced confessions and "an atmosphere of terror and vengeance, " *id. at 138*, the Court through a four-justice plurality described military habeas as follows: "It is the limited function of the civil courts to determine whether the military have given fair consideration" to each claim raised by petitioners. *Id. at 144.* As to factfinding, the plurality said that Article III courts should not be in the business of "reexamin[ing] and reweigh[ing] each item of evidenceof the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus." *Id.* The plurality concluded that the petitioners failed to show that the military review process was "legally inadequate" to resolve their constitutional claims and affirmed. *Id. at 146.* (Two additional justices concurred in the result, one of them writing that the Supreme Court's role was limited to assessing

the military courts' jurisdiction. *Id. at 146-48.*) In setting out this standard, the plurality explained that the Court must be at least as deferential as it is in the civilian habeas context, for in "military habeas corpus cases themselves, *even more than in state habeas corpus cases*, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings-of the fair determinations of the military tribunals after all military remedies have been exhausted." *Id. at 142* (emphasis added).

The uncertainty implied in these rankings of deference level is compounded by the evolution of habeas review over time. Until the Supreme Court's decision in *Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)*, the scope of habeas corpus review was equally narrow in both military and civilian cases--limited to verifying personal and subject-matter jurisdiction. In *Johnson*, a civilian federal habeas corpus case, the Supreme Court expanded the scope of jurisdictional challenges by holding that the trial court could lose jurisdiction by failing to provide constitutionally-guaranteed counsel to the defendant, *id. at 468*, and this developed into explicit review for constitutional violations. See *Calley v. Callaway, 519 F.2d 184, 195-96 (5th Cir. 1975)* (en banc) (citing *Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942)*, and *House v. Mayo, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739 (1945)*). *Burns* took military habeas review onto a similar path, though not to the same degree.

As the military habeas standard of review at one time followed review of state court judgments toward *less* deference, perhaps it (and other collateral review of military decisions) should follow the current path toward *more*. In light of the *Burns* Court's view that military habeas review must be at as least as deferential as habeas review of state criminal judgments, the Third Circuit has held that the former

enjoy at least as much deference as the latter do now, under the statutory standards adopted in the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"). See *Brosius v. Warden, 278 F.3d 239, 245 (3d Cir. 2002)* (citing *28 U.S.C. § 2254(d)-(e)*). But to the extent that Congress's revision of the standards for state court judgments arose out of special history and circumstances, its decision to tighten in that context may reflect no judgment at all about collateral review of court-martial judgments.

We trace these steps merely as a caution. Except insofar as a standard may be quite specific, such as AEDPA's requirement of a violation of "clearly established Federal law, as determined by the Supreme Court of the United States," see *28 U.S.C. § 2254(d)(1)*, we have serious doubt whether the judicial mind is really capable of applying the sort of fine gradations in deference that the varying formulae may indicate. See *United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995)*. It suffices for our purposes to repeat *Councilman*'s statement that errors must be fundamental to void a court-martial judgment on collateral review. And in light of *Councilman*'s point that non-habeas review is if anything more deferential than habeas review of military judgments, *420 U.S. at 753*, a military court's judgment clearly will not suffer such a defect if it satisfies *Burns*'s "fair consideration" test.

* * *

New first argues that the military courts violated his *Fifth Amendment* rights to due process by ruling that the lawfulness of the uniform order he violated was not an element of the offense--and thus not to be decided by the military jury. He evidently invokes the *Fifth Amendment* for two reasons. First, it is undisputed that the *Sixth Amendment* doesn't create any jury right in courts-martial. See *Ex parte Quirin, 317 U.S. 1, 38-41, 63 S. Ct. 2, 87 L. Ed. 3 (1942)*.

Second, the Court's decision in *United States v. Gaudin*, holding that the issue of materiality must be found by a jury beyond a reasonable doubt (it was conceded that materiality was an element of the false statements offense defined in *18 U.S.C. § 1001*), rested on the *Fifth Amendment* as well as the *Sixth. 515 U.S. 506, 509-10, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)*. Here, by virtue of a *statute, 10 U.S.C. § 851(c)*,any element of the offense must be submitted to the military jury for evaluation under the reasonable doubt standard. Thus, for the Court of Appeals, the *New* case presented the inverse of *Gaudin*: classification of the factor (lawfulness) as an "element" was unclear, but once the classification was made, the judge-jury allocation was indisputable. *55 M.J. at 104*. Other than the idea that lawfulness must be an element of the offense (coupled with *§ 851*'s requirement), New appears to offer no legal reason why the lawfulness issue should have gone to the military jury.

We find no fundamental defect in the Court of Appeals' conclusion that the lawfulness of an order is not a separate and distinct element of the offense, but rather is an issue for the military judge. *Id. at 105*. Identifying the elements of a statutory provision defining a crime is an exercise in statutory interpretation. The Court of Appeals started with the text and then turned to traditional aids instatutory interpretation: It considered--and identified powerful support in--the meaning of the key terms "lawful" and "order," the relevant legislative history, previous decisions of military courts, and the Manual for Courts-Martial. *Id. at 100-01*. And it distinguished lawfulness from "wrongfulness" and "materiality," which must go to the military jury when a service member is charged with violating *18 U.S.C. § 1001* under *10 U.S.C. § 934. CAAF Op., 55 M.J. at 105*. Finally, the Court of Appeals reasoned that if the lawfulness of an order were an element of the offense, "the validity of regulations and orders of critical

import to the national security would be subject to unreviewable and potentially inconsistent treatment by differing court-martial panels." *Id. at 105*. One judge contrasted the resulting "patchwork quilt" with "the unity and cohesion that is critical to military operations." See *id. at 110* (Effron, J., concurring).

New argues that the Court of Appeals' interpretation failed to apply the two-step methodology set out by the Supreme Court in *Neder v. United States*: "[W]e first look to the text of the statutes at issue," *527 U.S. 1 at 20, 119 S. Ct. 1827, 144 L. Ed. 2d 35*, and then look to the "accumulated settled meaning under the common law" if such a meaning exists. *527 U.S. 1, 21, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*. But there the issue was whether the language implied the existence of an element, whereas here the statute specified "*lawful* order," and the issue was that term's role--whether it set out an element of the offense or, as the Court of Appeals found, simply underscored the accused's "opportunity . . . to challenge the validity of the regulation or order." *CAAF Op., 55 M.J. at 105*. New also objected that the Court of Appeals' conclusion conflicts with a statement in *Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989)*, that in "a prosecution for disobedience, lawfulness of the command is an element of the offense." *Id. at 358*. But the Court of Appeals reasonably found that the remark was wholly unnecessary to the judgment. *CAAF Op., 55 M.J. at 102*. In any event, the Court of Appeals is "free to refine and develop its prior decisions" without our interference. *Priest, 570 F.2d at 1019*.

New also objects to the military courts' substantive conclusion that the uniform order was lawful in the sense that it was consistent with AR 670-1. That regulation allows commanders to require "organizational protective or reflective items . . . with the uniform when safety

considerations make it appropriate," par. 1-18, and allows commanders to prescribe the uniform "to be worn within [a] maneuver area," par. 2-6d. The military judge found that "[t]he wearing of distinctive and identifiable uniforms or uniform accessories easily recognizable in a combat environment or potential combat environment has a practical combat function which may enhance both the safety and/or tactical effectiveness of combat-equipped soldiers performing tactical operations," and thus that the U.N. insignia "had a function specifically designed to enhance the safety of United States armed forces in Macedonia." Court-Martial Transcript at 426; see also *CAAF Op., 55 M.J. at 107* (reaching same conclusion as military judge).

New acknowledges the presumption of lawfulness that attaches to military orders, *CAAF Op., 55 M.J. at 106*, but he contests the Court of Appeals' conclusion that he failed to overcome that presumption, *id. at 107*. He argues that the government failed to submit any evidence justifying the uniform order by reference to safety considerations or maneuver areas. He himself did not proffer any evidence on these issues. Before us, he instead points to a Stipulation of Fact concerning a totally unrelated provision of AR 670-1, which states that the uniform modifications "ha[d] *not* been approved by the Director of [t]he Institute of Heraldry, U.S. Army, as required and mandated under the provisions of paragraphs 27-16a and b of Army Regulation 670-1." We can hardly fault the military courts' judgment that this stipulation failed to rebut the presumption that safety considerations justified the uniform order. We note that Judge Sullivan of the Court of Appeals, who disagreed with the majority on the judge-jury issue, found the allocation of the issue to the judge a harmless error because the commanders had indisputably ordered use of blue U.N. patches and caps "as part of the operations plans for the mission and for safety purposes." *55*

M.J. at 127 (Sullivan, J., concurring in the result). Again, we can find no fundamental defect in the Court of Appeals' consideration of the issue.

New appears to rely on the same stipulation as evidence that the uniform order violated the Emoluments Clause of Article I, Sec. 9 of the Constitution. ("[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."). But he offers no legal analysis supporting his belief the U.N. patch and cap fall within the scope of the Emoluments Clause's prohibition on receipt of various possible honors or benefits from foreign states, and we find the claim a stretch at best. New argues that the claim did not receive fair consideration because it "was not litigated at all," see Brief for Appellants at 45; see also Reply Brief for Appellants at 12, but the military judge heard arguments on the subject, see, e.g., Court-Martial Transcript at 387, 391, 406-07, 417, ruled that the U.N. patch and cap "were neither gifts from a foreign government nor received by Specialist New from a foreign government," and observed that Congress appeared to authorize their receipt in a provision of the United Nations Participation Act, *id.* at 428. For claims as weak as this, summary disposition is completely consistent with fair consideration. See, e.g., *King v. Moseley, 430 F.2d 732, 734-35 (10th Cir. 1970).*

We turn next to New's arguments that the uniform order was unlawful because it was issued pursuant to a military deployment that was itself unlawful on several grounds. As he sees it, the deployment violated the United Nations Participation Act because the President incorrectly characterized the deployment as noncombatant and therefore governed by *22 U.S.C. § 287d-1*; in fact, New claims, it was a combatant operation that required Congressional approval

under *22 U.S.C. § 287d*. He further argues that because during the deployment he would be placed under the operational control of U.N. officials, the deployment violated the Commander-in-Chief Clause, the *Appointments Clause*, and the *Thirteenth Amendment*. Brief for Appellant at 13.

The military judge rejected these attacks on the deployment on two grounds--what appears to be a standing analysis, i.e., finding that the dispute over the uniform's legality "did not effectively call into issue the underlying legality of the deployment," Court-Martial Transcript at 429; see also *id.* at 432, and the political question doctrine, *id.* The Criminal Court of Appeals found consideration barred by the latter, *ACCA Op., 50 M.J. at 737, 739*, as did the Court of Appeals, *CAAF Op., 55 M.J. at 108-109*. As either want of standing or the political question doctrine would prevent adjudication on the merits, we may resolve them in any order. See *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits"); *Hwang Geum Joo v. Japan, 367 U.S. App. D.C. 45, 413 F.3d 45, 47-48 (D.C. Cir. 2005)*. Finding that the military courts' use of the political question doctrine deserves deference, we do not address standing.

Our courts have adjudicated claims based on two of the constitutional provisions New invokes--the *Appointments Clause* and the *Thirteenth Amendment*--without interposing the political question doctrine. See, e.g., *Weiss v. United States, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994)*(whether method of appointing military judges violates *Appointments Clause*); *Selective Draft Law Cases, 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 (1918)* (whether military draft law violates *Thirteenth Amendment*). But no such adjudication has occurred in the context of a court-martial

defendant who had refused to obey an order that he claimed was illegal because the *Appointments Clause* or the *Thirteenth Amendment* invalidated the deployment underlying the disobeyed order.

Whatever the application of the political question doctrine to these four challenges to a deployment order in an otherwise properly framed civil suit, the military justice context compels a somewhat broader doctrine in light of the implications of any alternative view. As the Court of Appeals observed, nothing gives a soldier "authority for a self-help remedy of disobedience." *55 M.J. at 108* (quoting *United States v. Johnson, 45 M.J. 88, 92 (C.A.A.F. 1996))*. Two of the canonical factors from *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*, "an unusual need for unquestioning adherence to a political decision already made," *369 U.S. at 217*, and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," *id.*, are uniquely powerful when the context is a soldier's use of the "self-help remedy of disobedience." Also supporting a broader sweep to the political question doctrine in military trials is the point made by Judge Effron in his concurring opinion-that the doctrine "ensur[es] that courts-martial do not become a vehicle for altering the traditional relationship between the armed forces and the civilian policy making branches of government" by adjudicating the legality of political decisions. *Id. at 110.* Thus we find no defect in the Court of Appeals' application of the political question doctrine, even though that application might be highly contestable in another context. Compare *Campbell v. Clinton, 340 U.S. App. D.C. 149, 203 F.3d 19, 24-28 (D.C. Cir. 2000)* (Silberman, J., concurring) (finding that no "judicially discoverable and manageable standards" exist for application of the Constitution's war powers clause or the War Powers Resolution, *50 U.S.C. §*

1541 et seq.), with *id. at 37-41* (Tatel, J., concurring) (concluding that such standards do exist). Given the threat to military discipline, see Court-Martial Transcript at 433, we have no difficulty accepting the military courts' reliance on the doctrine.

* * *

For the foregoing reasons, the district court's dismissal is *Affirmed*.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 96-0033 (PLF)

The United States ex rel., Michael G. New, Petitioner, v. Donald H. Rumsfeld, Secretary of Defense, and Les Brownlee, Acting Secretary of the Army, n1 Respondents.

n1 Secretary of Defense Donald Rumsfeld and Acting Secretary of the Army Les Brownlee have been substituted as the named defendants under Rule 25(d) of the Federal Rules of Civil Procedure.

350 F. Supp. 2d 80; 2004 U.S. Dist. LEXIS 25605

December 22, 2004, Decided
December 22, 2004, Filed

OPINION:

The petitioner in this case, Specialist Michael G. New, is an enlisted member of the United States Army convicted by court-martial of disobeying a lawful order under *Article 92 of the Uniform Code of Military Justice* and sentenced to a bad conduct discharge. Mr. New has filed a petition for a writ of habeas corpus, asking the Court to set aside his conviction based on the invalidity of the order he was convicted of disobeying, and the improper submission of that order's lawfulness to the military judge rather than to the court-martial panel.

Respondents, the Secretary of Defense and the Secretary of the Army, have filed a motion to dismiss petitioner's second amended complaint for failure to state a claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure.* Respondents

argue that all of petitioner's claims are either outside the scope of collateral review or are nonjusticiable under the political question doctrine. The Court agrees with respondents with respect to some but not all of petitioner's claims; however, because the Court finds petitioner's remaining claims to be without merit, it will grant respondents' motion to dismiss.

I. BACKGROUND

While serving in the United States Armed Forces as a Medical Specialist in 1995, petitioner Michael G. New was informed that his unit would be dispatched to the Republic of Macedonia to become part of the United Nations Peacekeeping Force in that country. See *New v. Cohen, 327 U.S. App. D.C. 147, 129 F.3d 639, 641 (D.C. Cir. 1997)*. Upon learning that he would be required to wear a U.N. shoulder patch on his uniform and distinctive U.N. headgear while in Macedonia, petitioner informed his squad leader and his platoon leader that he believed the uniform to be unlawful and that he would refuse to wear the U.N. uniform components unless convinced that the requirements were justified by United States constitutional authority. See id. Petitioner suggested that in order to avoid a controversy he be granted a transfer to another unit or, as an alternative, receive an honorable discharge. The Army denied both of these requests. See id. On October 10, 1995, petitioner appeared in formation without the U.N. uniform components and in violation of orders from his superior officers. See id. For refusing to obey the order of a military superior, petitioner was charged with an *Article 92* violation and the military initiated court-martial proceedings. See id. n2

n2 A more extensive discussion of the factual background of this case may be found in both an earlier opinion of this Court, see *United States ex rel. New v. Perry, 919 F. Supp. 491, 493-94 (D.D.C. 1996)*, and the

D.C. Circuit's subsequent affirmance of this Court's decision. See *New v. Cohen, 129 F.3d at 641-43.*

A. Initial Proceedings in this Court

On January 16, 1996, Petitioner petitioned this Court for a writ of habeas corpus and an emergency stay of the court-martial proceeding. The Court declined to stay the military proceedings, finding that petitioner had not shown a likelihood of success on the merits, that the quality of justice in the military courts was not inherently inferior to that provided by Article III courts, and that the public interest was clearly in favor of denying the stay in order to prevent confusion over the lawfulness of peacekeeping deployments in Macedonia. *United States ex rel. New v. Perry, 1996 U.S. Dist. LEXIS 348, Civil Action No. 96-0033, Memorandum Opinion and Order (D.D.C. Jan. 16, 1996).* The Court subsequently declined to issue a writ of habeas corpus. See *United States ex rel. New v. Perry, 919 F. Supp. 491, 500 (D.D.C. 1996).* The Court concluded that the principle of comity counsels deference and forbearance when the issues have been presented in adequate, ongoing proceedings in another tribunal with concurrent powers, particularly when the other forum is a military court. "The issues raised in this case," the Court stated, "are within the province of the military tribunals, and there is no need for this Court to 'blaze a trail on unfamiliar ground' when the military court stands ready to consider Specialist New's claims." *Id. at 499* (quoting *Noyd v. Bond, 395 U.S. 683, 696, 23 L. Ed. 2d 631, 89 S. Ct. 1876 (1969)).*

The court of appeals affirmed this Court's denial of habeas corpus relief. The appellate court agreed that the interests of comity and the rule of exhaustion mandated that petitioner pursue all remedies available to him within the military justice system before asking an Article III court to consider his

arguments. See *New v. Cohen, 129 F.3d at 642-44, 645*. The court held that none of the exceptions to the principles of comity or exhaustion applied to petitioner's situation, *id. at 644-47*, and that following any final decision by the military courts, petitioner "might be able to bring an action in district court seeking nullification of the conviction underlying his bad conduct discharge." *Id. at 648*.

B. Court-Martial Proceedings and Appeal

While petitioner was pursuing his appeal from this Court's decision, he was charged with disobedience, convicted by court-martial, and sentenced to a bad conduct discharge. See *New v. Cohen, 129 F.3d at 642*. Before trial, petitioner filed three motions to dismiss the charges against him.

The first motion to dismiss argued that the order to wear the U.N. uniform components (the "uniform order") was unlawful because President Clinton's order committing United States forces to the United Nations mission in Macedonia (the "deployment order") was unlawful on several statutory and constitutional grounds. See Second Amended Complaint ("2d. Am. Compl.") P9. Petitioner's second motion asserted that the uniform order was unlawful because it forced petitioner "involuntarily to serve as a United Nations soldier thereby depriving him of his rights as a United States soldier in violation of the *Thirteenth Amendment of the United States Constitution*." 2d. Am. Compl. P10. The third motion raised several challenges to the lawfulness of the uniform order. Petitioner claimed that the order violated *Article I, Section 9, clause 8 of the United States Constitution* (the "Foreign Emoluments Clause"), prohibiting any officeholder of the United States from accepting a present, office, title, or emolument from a foreign state; *5 U.S.C. § 7342* ("Receipt and disposition of foreign gifts and decorations") and *32 C.F.R. § 578.19*, its implementing regulation; and Army Regulation 670-1, governing the wear and appearance of army uniforms and

insignia. 2d. Am. Compl. P11. Petitioner also asserted that the uniform order "would subject [petitioner] to commit a crime under *Articles 134 UCMJ*, and would subject [petitioner] to civil penalties under *5 U.S.C. Section 7342*." Id.

Prior to trial, the military judge, deciding that the motions to dismiss raised interlocutory matters, ruled that both the uniform order and the deployment order were legal and denied all three motions to dismiss. See *United States v. New, 50 M.J. 729, 735 (A. Ct. Crim. App. 1999)* ("New I"). As a result, petitioner was precluded at trial from presenting evidence to the court-martial panel challenging the justification for the deployment and the legality of the orders. See id. Petitioner did, however, introduce sworn testimony and several exhibits in support of his motions, and the military judge made several findings of fact subsidiary to the determination of lawfulness. See *id. at 737-38*; Plaintiff's Motion to Reopen Proceeding and Substitute Parties Respondent, and for Leave to File an Amended and Supplemental Petition for a Writ of Habeas Corpus, App. 2 at 422-33 ("Trial Record"). The military judge also found the deployment order's lawfulness to be irrelevant because it was only the uniform order that petitioner was accused of disobeying. See Trial Record at 429; *New I, 50 M.J. at 737-38.*

Petitioner subsequently was tried and convicted. Because of the pretrial rulings, his defense was limited to asserting the affirmative defenses of mistake, inability, and obedience to higher orders. See *New I, 50 M.J. at 735.* Petitioner appealed his conviction to the United States Army Court of Criminal Appeals ("ACCA"), which affirmed petitioner's conviction on April 28, 1999, see *New I, 50 M.J. 729*, and then to the United States Court of Appeals for the Armed Forces ("CAAF"), which affirmed the conviction on June 13, 2001. See *United States v. New, 55 M.J. 95 (C.A.A.F. 2001)* ("New II").

Petitioner's appeal to the ACCA raised several challenges to the military judge's rulings. Petitioner first contended that the military judge's decision to rule on the lawfulness of the orders as a matter of law, rather than have the court-martial panel decide the question as one of fact, deprived petitioner of his rights under the *Fifth* and *Sixth Amendments*. Both appellate courts rejected petitioner's constitutional challenge and affirmed the military judge's ruling as proper under the UCMJ and the military courts' own jurisprudence. See *New I, 50 M.J. at 738*; *New II, 55 M.J. at 101-02* (citing *United States v. Carson, 15 USCMA 407, 408, 35 C.M.R. 379 (1965)*).

The ACCA and the CAAF also affirmed the military judge's related ruling that the lawfulness of an order is not an element of the offense of disobedience and that it therefore need not be decided by the court-martial panel. See *New I, 50 M.J. at 738*; *New II, 55 M.J. at 102-03* (citing *Cox v. United States, 332 U.S. 442, 92 L. Ed. 59, 68 S. Ct. 115 (1947)*, and *Yakus v. United States, 321 U.S. 414, 88 L. Ed. 834, 64 S. Ct. 660 (1944)*). In doing so, the CAAF rejected petitioner's argument that *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995)*, required a contrary holding, characterizing the question of whether the order's lawfulness was an element as a "matter of statutory interpretation in the military justice system," rather a matter of constitutional law. *New II, 55 M.J. at 104*. Citing the legislative history of the UCMJ as well as the need for consistent interpretations of the legality of military orders, the CAAF further held that the lawfulness of an order is a question of law to be decided by the military judge. See *id. at 105*.

Petitioner also challenged on appeal the military judge's ruling that the deployment and uniform orders were lawful. The ACCA, reviewing the matter *de novo*, held that the lawfulness of the deployment order was a nonjusticiable political question and therefore declined to consider petitioner's challenges to the

deployment order on the merits. See *New I, 50 M.J. at 740-41* (citing *Baker v. Carr, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)*, and *Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990))*. The CAAF upheld this ruling under the principles elaborated by the Supreme Court in Baker v. Carr, stating that "courts have consistently refused to consider the issue of the President's use of the Armed Forces." *New II, 55 M.J. at 108-09*. As to the uniform order, the ACCA, interpreting Army regulations, affirmed the military judge's finding of the order's lawfulness, *New I, 50 M.J. at 740*, and the CAAF affirmed in light of the presumption of lawfulness that attaches to military orders and petitioner's failure to present to the judge evidence sufficient to rebut that presumption. See *New II, 55 M.J. at 107-08*.

C. Collateral Review in this Court

His conviction having been affirmed through the military appeals process, petitioner moved in May 2002 to reopen proceedings in this Court. The Court granted petitioner's motion, see New v. Rumsfeld, Civil Action No. 96-0033 (D.D.C. June 18, 2002), and petitioner filed an amended complaint on July 7, 2002. In addition to the prayers for relief set forth in the current complaint, the first amended complaint sought an award of back pay and allowances petitioner had been deprived of as result of his court-martial conviction. See Amended Complaint at 16. Respondents filed a motion to dismiss the amended complaint for lack of subject matter jurisdiction, arguing that neither the Mandamus Act, *28 U.S.C. § 1361*, nor the Declaratory Judgment Act, *28 U.S.C. § 2201* (two of the statutory bases for petitioner's pleas for relief) waives the sovereign immunity of the United States for money damages. See Defendant's Motion to Dismiss or, in the Alternative, to Transfer at 3-4. The motion was briefed by the parties, but was mooted by petitioner's filing of a Second

Amended Complaint which eliminated his prayer for monetary relief. See 2d. Am. Compl. at 16.

The Second Amended Complaint raises four claims. The first is that petitioner was denied his due process right to trial by jury because the question of the lawfulness of the uniform order was decided as a question of law by the military judge. As a matter of due process, petitioner claims, the lawfulness of that order should have been submitted to the courtmartial panel and proved by the prosecution beyond a reasonable doubt. See 2d. Am. Compl. PP39-41. n3 Petitioner's second claim is that he was unconstitutionally denied his due process right to a full defense when the ACCA and the CAAF held that the legality of the deployment order under the Appointments and Commander-in-Chief Clauses of the United States Constitution and the *Thirteenth Amendment* was a nonjusticiable political question. See id. PP42-44.

> n3 A court-martial consists of a military judge and a court-martial panel, which serves a function roughly analogous to that of a civilian jury. See Art. 25, UCMJ, *10 U.S.C. § 825*; *Weiss v. United States, 510 U.S. 163, 167 n. 1, 127 L. Ed. 2d 1, 114 S. Ct. 752 (1994).*

Petitioner's third claim is that the military courts improperly refused to consider on the merits petitioner's challenge that the uniform order violated the Foreign Emoluments Clause of the Constitution in that the wearing of the U.N. patches and headgear would have constituted the acceptance of an emolument from a foreign government. See 2d. Am. Compl. PP45-49. Petitioner's fourth, alternative claim asserts that petitioner was denied due process of law when the military judge found, without fair support in the record, that the U.N.

patch and headgear were justified under military regulations as safety items in a maneuver area. See id. PP50-56.

Petitioner seeks a declaratory judgment that his court-martial conviction and sentence are null and void because they were obtained in violation of his constitutional rights, as well as injunctive relief in the form of a vacation of his conviction and sentence, reinstatement to the Army at the rank and seniority to which he would be entitled but for the court-martial, and correction of his military record. See 2d. Am. Compl. at 16.

Respondents filed a motion to dismiss the second amended complaint for failure to state a claim on April 30, 2004, and the matter was argued before the Court on October 19, 2004. Respondents argue first that all of petitioner's claims involve the legality of the deployment order, a nonjusticiable political question. See Defendants' Motion to Dismiss at 5-9 ("Defs'. Mot. Dismiss"). Alternatively, respondents assert that, if the political question doctrine does not bar review of all claims, then petitioner's claims as stated fall outside the limited scope of collateral review of a court-martial conviction. See id. at 9-14. In support of this claim, respondents argue that the military judge's ruling on the lawfulness of the orders disobeyed was a procedural, not a constitutional decision, id. at 14-19, and that the lawfulness of the uniform order was a factual determination not appropriate for review here.

II. DISCUSSION

A. Standard on a Motion to Dismiss for Failure to State a Claim

Petitioner brings this action as a petition for habeas corpus, seeking a declaratory judgment, injunctive relief, and a writ of mandamus. Respondents move to dismiss petitioner's second amended complaint for failure to state a claim on which relief can be granted. See *FED. R. CIV. P. 12(b)(6)*. n4 On a motion

to dismiss under *Rule 12(b)(6)*, the Court must assume the truth of the facts alleged in the complaint, and may grant the motion only if it appears beyond doubt that petitioner will be unable to prove any set of facts that would justify relief. *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 325, 114 L. Ed. 2d 366, 111 S. Ct. 1842 (1991)*; *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Browning v. Clinton, 352 U.S. App. D.C. 4, 292 F.3d 235, 242 (D.C. Cir. 2002)*; *Haynesworth v. Miller, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1254 (D.C. Cir. 1987)*. The complaint is construed liberally in petitioner's favor, and the Court should grant petitioner the benefit of all inferences that can be derived from the facts alleged. *Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994)*; accord *Andrx Pharmaceuticals v. Biovail Corp. Int'l, 347 U.S. App. D.C. 178, 256 F.3d 799, 805 (D.C. Cir. 2001)*. Nonetheless, the Court need not accept factual inferences drawn by petitioner if those inferences are not supported by facts alleged in the complaint, nor must the Court accept petitioner's legal conclusions. See *National Treasury Employees Union v. United States, 322 U.S. App. D.C. 135, 101 F.3d 1423, 1430 (D.C. Cir. 1996)*; *Kowal v. MCI Communications Corp., 16 F.3d at 1276*.

n4 The Supreme Court has enacted special procedural rules for actions challenging a petitioner's custody pursuant to a state court judgment under *28 U.S.C. § 2254*, which also may be applied "at the discretion of the United States district court" to other habeas cases, such as this one brought under *28 U.S.C. § 2241*. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 1(b). Nonetheless, the Federal Rules of Civil Procedure apply in habeas cases "to the extent that the practice in such proceedings is not set forth" in the habeas rules

themselves or other statutes "and has heretofore conformed to practice in civil actions." *FED. R. CIV. P. 81(a)(2).*

When addressing a motion to dismiss under *Rule 12(b)(6)*, the Court generally may not look outside the facts contained within the four corners of the complaint, see *Gordon v. National Youth Work Alliance, 218 U.S. App. D.C. 337, 675 F.2d 356, 361 (D.C. Cir. 1982)*, unless it treats the motion to dismiss as a motion for summary judgment. See *FED. R. CIV. P. 12(b)*; *Currier v. Postmaster Gen., 353 U.S. App. D.C. 272, 304 F.3d 87, 88 (D.C. Cir. 2002)*; 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 12.34(2) (3d ed. 2002). The Court may, however, "take judicial notice of matters of a general public nature, such as court records, without converting the motion to dismiss into one for summary judgment." *Baker v. Henderson, 150 F. Supp. 2d 17, 19 n. 1 (D.D.C. 2001)*. See also *Hinton v. Shaw Pittman Potts & Trowbridge, 257 F. Supp. 2d 96, 100 n. 5 (D.D.C. 2003)*; *Jacobsen v. Oliver, 201 F. Supp. 2d 93, 110 (D.D.C. 2003)*; 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 12.34(2) (3d ed. 2002). Among other things, a court may take judicial notice of the factual findings of another court as part of the public record. See *Weil v. Markowitz, 264 U.S. App. D.C. 381, 829 F.2d 166, 173 (D.C. Cir. 1987)*; accord *Dupree v. Jefferson, 215 U.S. App. D.C. 43, 666 F.2d 606, 608 n. 1 (D.C. Cir. 1981)* (same). Thus, in considering respondents' motion to dismiss for failure to state a claim, the Court may consider the record created by the military courts as well as the factual findings of the court-martial.

B. Scope of Review for Collateral Attack on Court-Martial Conviction

Because this is a collateral attack on petitioner's court-martial conviction under *28 U.S.C. § 2241*, this Court's review

is limited. Just how limited is a matter that demands some clarification.

It has long been held that Article III courts have authority to consider collateral attacks challenging a court-martial tribunal's jurisdiction to try a case. See *In re Grimley, 137 U.S. 147, 150, 34 L. Ed. 636, 11 S. Ct. 54 (1890)* ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence."). The United States Supreme Court announced the basic principles of an expanded habeas corpus review in *Burns v. Wilson, 346 U.S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953)*. Recognizing that military courts have responsibilities to protect the constitutional rights of accused soldiers, a plurality of the Court in Burns declared that it is "the limited function of the civil courts" on habeas corpus review "to determine whether the military have given fair consideration to each of [petitioner's] claims." *Burns v. Wilson, 346 U.S. at 144*; see *id. at 142* ("when a military decision has dealt fully and fairly with an allegation raised in [the application for habeas corpus relief], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."). Such review does not allow the federal civil court on a collateral challenge to review the military courts' evidentiary rulings, or to re-weigh the evidence itself. See *id. at 142, 144*.

Burns left open two significant questions: what constitutes "full and fair consideration" of a petitioner's claims, and what kinds of claims are cognizable on habeas review. With respect to the first question, the circuits have arrived at a variety of interpretations. The governing precedent in this Circuit is *Kauffman v. Secretary of the Air Force, 135 U.S. App. D.C. 1, 415 F.2d 991 (D.C. Cir. 1969)*. There the United States Court of Appeals for the District of Columbia Circuit held that the principal opinion in Burns did not apply a standard of review of

convictions by military tribunals different from that employed in habeas corpus review of state convictions under *28 U.S.C. § 2241. Id. at 997.* Noting that the Supreme Court has "never clarified the standard of full and fair consideration, and it has meant many things to many courts," the D.C. Circuit held that the "test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." Id. Thus, while it is not for this Court to review the military judge's factual findings or evidentiary rulings, it need not defer to constitutional rulings not conforming to "Supreme Court standards."

With respect to the second question left open by Burns - the nature of the claims the Court may examine when considering a collateral attack on a decision of a military tribunal - the courts have spoken with less clarity. Burns, like Kauffman, allowed review of a habeas petitioner's constitutional challenges to a court-martial conviction, but did not consider whether claims of non-constitutional legal error also might be entertained on habeas corpus review.

Petitioner in this case not only claims constitutional error in his court-martial conviction, but also asserts errors in the application of federal statutes and regulations - specifically, that the deployment order violated the United Nations Participation Act, *22 U.S.C. § 287, et seq.* ("UNPA"), and that the uniform order violated Army uniform regulations. Some of petitioner's claims also implicate the proper interpretation of certain provisions of the Uniform Code of Military Justice. The Court therefore must decide whether it can entertain claims of such non-constitutional error on a petition for habeas corpus challenging a military conviction.

Although both Burns and Kauffman suggest that this Court's review is not limited to constitutional error, no case in this circuit has explicitly addressed the question of whether

claims of non-constitutional legal error in a court-martial proceeding are cognizable on a habeas corpus petition. A number of decisions seem to have assumed without deciding that only constitutional claims are appropriate for collateral review. See, e.g., *Priest v. Secretary of the Navy, 187 U.S. App. D.C. 104, 570 F.2d 1013, 1019 (D.C. Cir. 1977)* ("On collateral review we are concerned only with fundamental constitutional errors."); *Williamson v. Secretary of the Navy, 395 F. Supp. 146, 147 (D.D.C. 1975); Staton v. Froehlke, 390 F. Supp. 503, 505 (D.D.C. 1975); Stolte v. Laird, 353 F. Supp. 1392, 1395 (D.D.C. 1972).*

The Court has uncovered only one appellate case squarely to have considered the issue. In *Allen v. Cantfort, 436 F.2d 625 (1st Cir. 1971)*, the United States Court of Appeals for the First Circuit declined to read Burns to foreclose consideration of all errors of federal statutory law committed by the military courts. Based on the language of the habeas corpus statute, the court in Cantfort held that a reviewing court "cannot refuse to consider all alleged errors of law committed by the military without explicit authority for doing so. We cannot read Burns v. Wilson as such authority; in mentioning only errors of constitutional magnitude, Burns was facing the only question before it." *Allen v. Cantfort, 436 F.2d at 629* (citations omitted). See *28 U.S.C. § 2241(c)(3)* (writ shall not extend to a prisoner unless he or she is in custody "in violation of the Constitution or laws or treaties of the United States."). n5 The same may be said of decisions in this circuit: In setting the scope of collateral review, only constitutional claims have been mentioned because only constitutional claims have been raised. See *Priest v. Secretary of the Navy, 570 F.2d at 1019; Kauffman v. Secretary of the Air Force, 415 F.2d at 995-96; Williamson v. Secretary of the Navy, 395 F. Supp. at 147; Staton v. Froehlke, 390 F. Supp. at 505; Stolte v. Laird, 353 F. Supp. at 1395.*

n5 The court in Allen went on to consider and reject petitioner's claim that his court-martial conviction violated *Article 45(b) of the UCMJ. Allen v. Cantfort, 436 F.2d at 629.*

In *Cothran v. Dalton, 83 F. Supp. 2d 58 (D.D.C. 1999)*, Judge Flannery effectively held that non-constitutional claims can be reviewed on collateral attack of military convictions and provided the standard for review of such claims. He expressly held in the disjunctive that "collateral relief is available where the plaintiff alleges either a constitutional error, a lack of jurisdiction *or* an error 'so fundamental as to have resulted in a miscarriage of justice.'" *Id. at 66* (emphasis added) (quoting *Calley v. Callaway, 519 F.2d 184, 199 (5th Cir. 1975)).* n6 The decision Judge Flannery cited, Calley v. Calloway, in turn relied on and quoted the Supreme Court's opinion in *Davis v. United States, 417 U.S. 333, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974).* The court in Calley noted:

> Most habeas corpus cases have provided relief only where it has been established that errors of constitutional dimension have occurred. But the Supreme Court held in a recent decision that nonconstitutional errors of law can be raised in habeas corpus proceedings where "the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,'" and when the alleged error of law '" presented exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" *Davis v. United States, 417 U.S. 333, 346, 94 S. Ct. 2298, 2305, 41 L. Ed. 2d 109 (1974)*, quoting *Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 471, 7 L. Ed. 2d 417 (1962).* Thus, an essential prerequisite of any

> court-martial error we are asked to review is that it present a substantial claim of constitutional dimension, *or* that the error be so fundamental as to have resulted in a gross miscarriage of justice.

Calley v. Callaway, 519 F.2d at 199 (emphasis added) (footnote omitted). n7 See also *United States v. Addonizio, 442 U.S. 178, 185, 60 L. Ed. 2d 805, 99 S. Ct. 2235 (1979)*; *Hill v. United States, 368 U.S. 424, 428, 7 L. Ed. 2d 417, 82 S. Ct. 468 (1962)*. Davis itself made clear that when there is a claim of fundamental error, "there is no support ... for the proposition that a claim is not cognizable [on habeas corpus] merely because it is grounded in the 'laws of the United States' rather than the Constitution." *Davis v. United States, 417 U.S. at 346.*

> n6 At oral argument, respondents incorrectly interpreted Cothran as limiting collateral review to fundamental constitutional errors. But consistent with *Davis v. United States, 417 U.S. 333, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974)*, Judge Flannery actually held in Cothran that *any* constitutional or jurisdictional error is subject to such review on collateral attack, while statutory claims are subject to such review only if they are so fundamental as to render the court-martial proceeding unfair. *Cothran v. Dalton, 83 F. Supp. 2d at 66.*

> n7 The Court in Davis also stated that "there can be no doubt that the grounds for relief" under both *28 U.S.C. § 2255* and *28 U.S.C. § 2254* (the general federal habeas corpus statute) are the same: "relief is available on the ground that '[a person] is in custody in violation

> of the Constitution *or laws* or treaties of the United States.'" *Davis v. United States, 417 U.S. at 344* (quoting *28 U.S.C. § 2254*) (emphasis by Supreme Court).

This Court therefore holds that non-constitutional legal claims - that is, claims arising under federal statutes or regulations - may be considered on collateral review of a military conviction if the application of the statutes or regulations resulted in an error "so fundamental as to have resulted in a miscarriage of justice." *Cothran v. Dalton, 83 F. Supp. 2d at 66.*

In considering such claims the Court will, however, afford substantial deference to the military courts in their application of military law. As the Supreme Court has noted, "military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal establishment." *Burns v. Wilson, 346 U.S. at 140*; see also *Parker v. Levy, 417 U.S. 733, 744, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974).* The Court of Appeals for the Armed Forces is a court made up of civilian judges appointed to fifteen year terms by the President, with the advice and consent of the Senate. *10 U.S.C. § 942*; see *Weiss v. United States, 510 U.S. at 169.* When "dealing with areas of law peculiar to the military branches," the judgments of the Court of Appeals for the Armed Forces therefore "are normally entitled to great deference." *Middendorf v. Henry, 425 U.S. 25, 44, 47 L. Ed. 2d 556, 96 S. Ct. 1281 (1976)*; see *Schlesinger v. Councilman, 420 U.S. 738, 764, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975)* (Brennan, J., dissenting) (quoting *Noyd v. Bond, 395 U.S. at 696*) (deference by civilian courts most appropriate when cases involve extremely technical provisions of Uniform Code of Military Justice). Deference, of course, does not mean that an Article III court cannot review the military courts' conclusions with respect to statutes and

regulations or apply its own interpretation of the law. See *Middendorf v. Henry, 425 U.S. at 43-46.* This deferential approach to "military law" includes both military regulations and the provisions of the UCMJ, but not (importantly for this case) the United Nations Participation Act and other statutes of general applicability.

In sum, the Court's review in this case is limited to: (1) challenges to the jurisdiction of the court-martial tribunal; (2) constitutional challenges not fully and fairly considered by the military courts; (3) constitutional challenges resolved by the military courts in contravention of Supreme Court standards, unless conditions peculiar to military life require a different rule; and (4) non-constitutional legal challenges that implicate fundamental defects in the court-martial proceedings. See *Davis v. United States, 417 U.S. at 344*; *Kauffman v. Secretary of the Air Force, 415 F.2d at 997*; *Cothran v. Dalton, 83 F. Supp. 2d at 66.* The military courts' interpretation of specifically military law is furthermore afforded considerable deference.

C. Petitioner's Claims

1. Count I: Lawfulness of the Uniform Order as a Question for the Military Judge

Count I of the Second Amended Complaint asserts constitutional error in the CAAF's holding that the lawfulness of the uniform order disobeyed by petitioner was not an element of the offense of disobedience under *Article 92 of the UCMJ*, and was a question of law properly decided by the military judge. See 2d. Am. Compl. PP29-31, 39-41; Pl's. Opp. at 25. Petitioner claims that under the Supreme Court's decision in *Gaudin v. United States, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995)*, the lawfulness of the order was an element of the offense of disobedience, and the military judge's failure to submit the question to the court-martial panel violated

petitioner's *Sixth Amendment* right to a jury trial. See 2d. Am. Compl. PP39-41; Pl's. Opp. at 25.

Gaudin, however, simply does not apply in this context. The accused in court-martial proceedings are entitled to some constitutional protections, but the *Sixth Amendment's* guarantee of a jury of one's peers does not exist when one stands before a court-martial tribunal. "Military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Toth v. Quarles, 350 U.S. 11, 17-18, 100 L. Ed. 8, 76 S. Ct. 1 (1955)*; see also *Whelchel v. McDonald, 340 U.S. 122, 127, 95 L. Ed. 141, 71 S. Ct. 146 (1950)* (right to trial by jury guaranteed by *Sixth Amendment* not applicable to trials by courts-martial or military commissions); *Ex Parte Quirin, 317 U.S. 1, 40-41, 87 L. Ed. 3, 63 S. Ct. 2 (1942)* (*Sixth Amendment* right to jury trial does not extend to trial by military commission); *Ex Parte Milligan, 71 U.S. 2, 123, 18 L. Ed. 281 (1866)* (*Sixth Amendment* right to jury trial limited to persons subject to indictment or presentment in civilian courts under *Fifth Amendment*). To the extent that a right to jury trial exists in this context, it is a creation of the Uniform Code of Military Justice, not the United States Constitution. n8

n8 Perhaps recognizing the inapplicability of the *Sixth Amendment* in this context, plaintiff attempts to frame the Gaudin question as one of simple due process. Without the jury trial guarantees of the *Sixth Amendment*, however, due process alone is insufficient to give petitioner that which he seeks. "The [*Sixth] Amendment* was tailored explicitly for the criminal justice system," and it "defines the 'process that is due' ..." *Gerstein v. Pugh, 420 U.S. 103, 125 n. 27, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975).*

Accordingly, the CAAF appropriately looked to the provisions of the UCMJ and to the military courts' jurisprudence to answer this question. Interpreting *Article 51(b) of the UCMJ*, Section 801(a)(4) of the Manual for Courts-Martial, and *United States v. Carson, 15 USCMA at 408*, it determined the lawfulness of both the uniform and the deployment orders to be questions of law properly decided by the military judge as an interlocutory matter. *New II, 55 M.J. at 100-01*. In further holding that lawfulness was not an element of the offense of disobedience, the CAAF again treated the question as "a matter of statutory interpretation" and looked to the UCMJ as well as to traditional practice in military courts. *Id. at 104-05*.

These issues were fully litigated at trial and considered carefully by the military courts of appeals. See Trial Record at 433-49; *New I, 50 M.J. at 736, 738-39*; *New II, 55 M.J. at 100-06*. This Court declines petitioners' invitation to review these holdings, both because the military courts fully and fairly considered petitioner's challenges, and also because they assert neither constitutional infirmities nor other "fundamental defects" amenable to collateral review, but rather specialized questions of military law on which the Court defers to the military courts.

2. Count II: Lawfulness of the Deployment Order

In Count II, petitioner renews several challenges to the lawfulness of the deployment order that were rejected by the military courts. Petitioner claims that the deployment order was illegal under the United Nations Participation Act; that it violates the Appointments and Commander-in-Chief clauses of the United States Constitution; and that it would force petitioner to serve as a "United Nations fighting person," in

violation of the *Thirteenth Amendment* prohibition against involuntary servitude.

At trial, petitioner presented hundreds of pages of briefing and extensive testimony from a designated expert in international law to show that the deployment order violated the UNPA. The military judge considered the evidence and made several findings of fact with regard to this question. See Trial Record at 424-28; *New I, 50 M.J. at 736-38.* Ultimately, however, he found the legality of the deployment order to present a nonjusticiable political question, and rejected petitioner's UNPA challenge to the deployment order. See Trial Record at 421-31.

The military judge also rejected petitioner's constitutional challenges to the deployment order as presenting a political question. Although these issues were briefed by the parties, it is not clear from the trial record that these challenges (unlike petitioner's UNPA argument) were fully and fairly considered by the military judge before he held them to present nonjusticiable political questions. The military appellate courts upheld the trial judge's rulings on the political question doctrine. See *New I, 50 M.J. at 740-41*; *New II, 55 M.J. at 108-09.*

To the extent that the military courts' determination that the legality of the deployment order was a nonjusticiable question prevented their reaching the merits of petitioner's challenges, they did not afford full and fair consideration to these challenges, and *Burns* therefore does not preclude collateral review. The military courts did not necessarily err in holding that petitioner's challenges to the deployment order presented a nonjusticiable political question, but under Burns the Court will not defer to their decisions on this issue.

The Court's analysis of petitioner's challenges to the deployment order's lawfulness, then, must start by determining

(1) whether the challenge is within the proper scope of collateral review, and (2) whether the challenge presents a nonjusticiable political question. Only if the first question is answered in the affirmative and the second in the negative must the Court consider petitioner's challenges on their merits. n9

> n9 The trial judge also held (and respondents argue) that the legality of the deployment order is irrelevant to petitioner's court-martial conviction, because petitioner was convicted of disobeying the uniform order, not the deployment order. Trial Record at 429. Petitioner's position is that because the lawfulness of the former flows from the lawfulness of the latter, the deployment order is relevant. Because the Court finds all of petitioner's challenges to the deployment order either to present nonjusticiable political questions, to be outside the scope of collateral review, or to be without merit, it need not resolve this question.

a. Political Question Doctrine

The contours of the modern political question doctrine were identified by the United States Supreme Court in Baker v. Carr:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an

> unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217. See also *Nixon v. United States, 506 U.S. 224, 228, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993); Goldwater v. Carter, 444 U.S. 996, 998, 62 L. Ed. 2d 428, 100 S. Ct. 533 (1979)* (Powell, J., concurring). The doctrine is "essentially a function of the separation of powers," *Baker v. Carr, 369 U.S. at 217*, insofar as it is beyond the competence or authority of the judicial branch to review certain decisions constitutionally committed to the political branches, or, in some cases, to intervene in controversies between those branches by fixing the allocation of powers between Congress and the President under the Constitution. The doctrine also encompasses situations where a case presents factual questions, or mixed questions of law and fact, not amenable to judicial determination because of a "lack of judicially discoverable and manageable standards." See id.; see also *Campbell v. Clinton, 340 U.S. App. D.C. 149, 203 F.3d 19, 24-28 (D.C. Cir. 2000)* (Silberman, J., concurring).

In arguing for affirmance of the military courts' application of the political question doctrine to preclude consideration of the legality of the deployment order, respondents assert that the courts traditionally have declined to assert jurisdiction over legal challenges to the President's deployment of the armed forces. See Defs.' Mot. Dismiss at 6-8. Petitioner responds that his challenges to the deployment order do not implicate "the provisions of the U.S. Constitution that allocate war power between the Congress and the President," and thus do not present a nonjusticiable political question. Pl's. Opp. at 11. The

War Powers clause, however, is not the only constitutional provision that may present a nonjusticiable political question; such a question may arise in relation to other constitutional provisions if one or more of the conditions set out in Baker prevail.

Petitioner also argues that this case is distinct from many of those in which a nonjusticiable political question has been found, because it is not "a political dispute" between the branches, but a court-martial, at which petitioner has "liberty and property interests" at stake. Pl's. Opp. at 14-15. By court-martialing petitioner for disobedience, petitioner argues, the government has "put into play" the issue of the order's lawfulness, and it should not "under the guise of the political question doctrine" be permitted to remove the issue from consideration. Id. at 16. This argument is based on an erroneous understanding of the policy behind the political question doctrine. The doctrine does not exist to protect or advantage government litigants; it exists "to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen, 392 U.S. 83, 95, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968)*; see also *Gilligan v. Morgan, 413 U.S. 1, 9-10, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973)*. To the extent that the Court's restraint works to the government's benefit in this case, it is because the doctrine prevents the normal presumption of a military order's lawfulness from being rebutted.

In any event, petitioner's claim that the government "put into play" the issue of the deployment order is misguided. It was petitioner who sought to bring into question the order's legality by his deliberate and informed decision to disobey the uniform order in violation of *Article 92 of the UCMJ*. Having come to the conclusion that the orders he had been given were unlawful, petitioner had numerous avenues, besides direct disobedience, by which to challenge that order. n10 Instead,

petitioner chose to disobey the order, knowing full well that a court-martial prosecution was the normal and predictable consequence of that action. Petitioner may be applauded for acting "according to his convictions" in refusing to obey an order he thought illegal, but having put his liberty on the line to make an arguably political statement, he can hardly argue that the posture of the case places it beyond the reach of the political question doctrine. See *New II, 55 M.J. at 110* (Effron, J., concurring).

> n10 "Congress has provided him with a variety of means to communicate his views to his superiors and national policy makers. He may challenge policy through a complaint under Article 138, UCMJ, *10 U.S.C. § 938*; he may raise his concerns to the Inspector General of the Department of Defense, 5 U.S.C. Appendix; and he may communicate directly with Members of Congress and Inspectors General without interference from his military superiors and with protections against reprisal, *10 U.S.C. § 1034*." *New II, 55 M.J. at 110* (Effron, J., concurring).

Nonetheless, in characterizing the legality of the deployment order as a nonjusticiable political question, the CAAF improperly aggregated all of petitioner's claims of illegality under the rubric of a "challenge to the President's use of the Armed Forces." See *New II, 55 M.J. at 109-10*. Baker makes clear that the proper application of the doctrine turns not on the political nature of the action or decision being challenged, but on the nature of the particular legal challenge itself. "The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr, 369 U.S. at 217*. See also *Antolok v. United States, 277 U.S. App. D.C. 156, 873 F.2d 369, 392 (D.C. Cir. 1989)* (Wald, C. J., concurring) ("I read [Baker v. Carr] as a reminder that our

focus should be on the particular issue presented for our consideration, not the ancillary effects which our decision may have on political actors."). Thus, the Court must consider individually the justiciability of each of petitioner's specific challenges to the deployment order.

b. United Nations Participation Act

Petitioner first contests the deployment order under the United Nations Participation Act, *22 U.S.C. § 287, et seq.* The military courts considered and rejected this challenge as presenting a nonjusticiable political question.

Petitioner's challenge under the UNPA does not raise a claim of fundamental error or unfairness in his court-martial proceedings, and this Court therefore will not re-assess it on collateral review. The UNPA, the "law of the United States" petitioner claims his conviction was rendered in violation of, is a statute governing the powers and conduct of the President in his conduct of foreign affairs; it does not vest any personal rights in petitioner, nor does it implicate in any fashion the conduct of court-martial or other military disciplinary proceedings. Thus, it is unlikely that even an incorrect application of this law would cause a "fundamental defect" in petitioner's court-martial proceedings. See *Davis v. United States, 417 U.S. at 346*. Furthermore, the military court heard extensive testimony and argument from petitioner on the application of the UNPA to the facts at hand, and by all indications considered the issue fully and fairly. Petitioner may disagree with the outcome, but there is nothing fundamentally unfair about the military courts' decisions that the political question doctrine bars consideration of petitioner's claim under the UNPA.

In any event, the Court agrees that this challenge presents a nonjusticiable political question. The essence of petitioner's claim is that President Clinton unlawfully circumvented the

UNPA's requirement of congressional consent for certain types of troop deployments by misrepresenting the nature of the action in Macedonia. The President purported to conduct the operation under *22 U.S.C. § 287d-1* ("Noncombatant assistance to United Nations"), which authorized him, without the consent of Congress, to deploy up to one thousand armed forces personnel "to serve as observers, guards, or in any noncombatant capacity" with the United Nations, under Chapter VI of the U.N. charter. Id. Petitioner argues, however, that the deployment order did not meet the requirements of that provision, but should in fact have been conducted under *22 U.S.C. § 287d* ("Use of armed forces; limitations"), which refers to Chapter VII of the U.N. charter and authorizes the President to detail troops to the U.N. for combat purposes only with the approval of Congress.

Petitioner raises a question of the allocation of war-making power between the political branches: must the President have obtained the consent of Congress before initiating this operation in Macedonia? There is, however, no conflict between the branches on this matter; no contingent of Congress has ever stepped forward to dispute the President's characterization of the Macedonian deployment as a Chapter VI operation or suggested that he had to seek the approval of Congress before proceeding. n11 "Judges traditionally have expressed great reluctance to intercede in disputes between the political branches of government that involve matters of war and peace." *Campbell v. Clinton, 52 F. Supp. 2d 34, 40 (D.D.C. 1999)*. When no evidence of such a dispute even exists and, by all appearances, the executive and legislative branches agreed in this instance that there was no need for congressional approval, it would be most inappropriate for the Court to "undertake independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government." *Baker v. Carr, 369 U.S. at 217*; see also *Ange*

v. Bush, 752 F. Supp. at 514 ("This court's refusal to exercise jurisdiction ... by no means permits the President to interpret the executive's powers as he sees fit ... Congress possesses ample powers under the Constitution to prevent Presidential overreaching, should Congress choose to exercise them."). The Court therefore finds this challenge to the deployment order to present a nonjusticiable political question.

n11 On July 9, 1993, and again on January 8, 1994, President Clinton reported to the House of Representatives on the status of U.S. operations in Macedonia. In these reports, the President characterized the operations as proceeding under Chapter VI of the U.N. Charter, and the U.S. presence in Macedonia as a "peacekeeping force" deployed in compliance with the UNPA. Petitioner makes no assertion, and there is no indication, that Congress ever questioned the President's description.

c. *Appointments Clause*

Petitioner also asserts that the deployment order violates the *Appointments Clause, U.S. Const., Art. II § 2, cl. 2.* n12 The basis of this claim is that "by the order to deploy to Macedonia as a member of a U.N. military force, New was placed under the command and control of a foreign military officer who had not been appointed in accordance with the procedural provisions set forth in Section 2, Article II[.]" Pl's. Mot. Reopen at 32. n13

n12 The clause reads, in its entirety:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

n13 To demonstrate that this challenge is justiciable, petitioner cites cases in which the Supreme Court has entertained *Appointments Clause* challenges to the appointment of a variety of government officials. See Pl's. Mot. Reopen at 32. The cases cited, however, indicate only that *some Appointments Clause* challenges do not raise nonjusticiable political questions, not that this one is justiciable. Petitioner offers no precedent for an *Appointments Clause* challenge to the designation of an individual involved in the day-to-day conduct of foreign affairs or military field operations.

Officers of the United States for purposes of the *Appointments Clause* are persons either appointed by the President and confirmed by the Senate, designated as "superior officers," or those "inferior officers" whose appointments

Congress vests in the President alone, or the Courts, or the heads of Departments. *U.S. Const., Art. II § 2, cl. 2*; see *Buckley v. Valeo, 424 U.S. 1, 124-25, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); United States v. Germaine, 99 U.S. 508, 511-12, 25 L. Ed. 482 (1878)*. The *Appointments Clause* imposes different procedural requirements on the designation of these two types of officers. See *United States v. Germaine, 99 U.S. at 509-10*. Military officers in the field, even command officers, are not "superior officers" who must be confirmed by the Senate, but "inferior officers" commissioned by the President. See *Weiss v. United States, 510 U.S. at 182* (Souter, J., concurring).

For any foreign military officer involved in the Macedonian deployment to have been subject to any of the procedural requirements of the *Appointments Clause*, such an individual must in fact have been an "officer of the United States," which the Supreme Court has defined as an "appointee exercising significant authority pursuant to the laws of the United States." *Buckley v. Valeo, 424 U.S. at 125*. Although the phrase "significant authority" is not clearly defined, the term "officer of the United States" has been held to "embrace[] the idea of tenure, duration, emolument, and duties [that are] continuing and permanent, not occasional or temporary." *United States v. Germaine, 99 U.S. at 509-10, 511-12*.

To the extent that United Nations officers on the mission to Macedonia exercise any power "under the laws of the United States," a dubious proposition, they do so only under a temporary arrangement limited in both scope and duration. Their power to direct U.S. forces is entirely subject to the "terms and conditions" defined by the President under the UNPA, pursuant to his determination of what is "consistent with the national interest." *22 U.S.C. § 287d-1*. The U.N. officers' extremely limited scope of authority is indicated by the military judge's factual determination that "the United States

military chain-of-command remained inviolate" in Macedonia under the deployment order. *New II, 50 M.J. at 738*; see Trial Record at 426-27. Because their authority has been carefully circumscribed, these individuals do not exercise "significant authority pursuant to the laws of the United States," and thus are not "officers of the United States" for *Appointments Clause* purposes. *Buckley v. Valeo, 424 U.S. at 125.* Cf. *United States v. Hartwell, 73 U.S. 385, 393, 18 L. Ed. 830 (1868)* ("A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.").

Because the Court finds that the United Nations officers in question did not exercise "significant authority" under the laws of the United States, the Court holds that they are not officers of the United States and that the deployment order therefore does not offend the *Appointments Clause.*

d. Commander-in-Chief Clause

Petitioner claims that the deployment order violated the Commander-in-Chief Clause, *U.S. Const., Art. II § 2, cl. 1*, because "by deploying American soldiers under the command and control of foreign military officers" the President wrongfully delegated his authority as Commander-in-Chief to officers of foreign militaries. Pl's. Mot. Reopen at 32.

The Commander-in-Chief clause commits to the President the discretion to command the Armed Forces of the United States "in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page, 50 U.S. 603, 615, 13 L. Ed. 276 (1850).* While the Supreme Court has never said that all decisions made by the President purportedly in his role as commander-in-chief are beyond the purview of the judicial branch, see, e.g., *Mitchell v. Laird, 159 U.S. App. D.C.*

344, 488 F.2d 611, 614 (D.C. Cir. 1973); Flynt v. Rumsfeld, 245 F. Supp. 2d 94, 11-13 (D.D.C. 2003), aff'd on other grounds *359 U.S. App. D.C. 402, 355 F.3d 697 (D.C. Cir. 2004)*, the clause itself represents "a textually demonstrable constitutional commitment of the issue to a coordinate political department," see *Nixon v. United States, 506 U.S. at 228-29*; *Baker v. Carr, 369 U.S. at 217*, thus placing a challenge like petitioner's squarely within the realm of cases that present nonjusticiable political questions.

Petitioner argues, however, that his claim does not present a political question, because the basis for the challenge is not that the President has unwisely exercised his *discretion* under the Commander-in-Chief clause, but that he has, by his delegation of authority to United Nations officers, completely abrogated his *duty* to command the armed forces. See Pl's. Mot. Reopen at 32-33. Even if the political question doctrine recognized some distinction between "duties" and "discretion" with respect to the commitment of an issue to one of the political branches, the Court is without "judicially discoverable and manageable standards" for deciding whether the President has abrogated entirely his constitutional duty to command. Such a decision would involve policy determinations beyond the competence of the Court. As the Supreme Court stated:

> It would be difficult to think of a clearer example [than the deployment of military forces] of the type of governmental action that was intended by the Constitution to be left to the political branches ... Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments,

> subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system[.]

Gilligan v. Morgan, 413 U.S. at 10-11 (emphasis omitted). Petitioner's challenge is thus nonjusticable.

Even if the question were justiciable, the only authority cited by petitioner in support of his claim that the President's authority as commander-in-chief may not be delegated is *Printz v. United States, 521 U.S. 898, 936, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997)*, in which the Supreme Court, invalidating provisions of the *Brady Handgun Violence Prevention Act* for unconstitutionally commandeering state officials to perform duties under federal law, discussed the need to preserve presidential control over the implementation of congressional directives. *Printz*, however, dealt not with the President's power to make war or conduct foreign affairs, but with a *congressional* delegation of responsibility, and focused on the obligations unconstitutionally imposed by the Brady Handgun Law on *state* officials. It is thus completely inapposite to the present case.

Furthermore, the military judge at petitioner's court-martial made a factual finding that "the President, as commander-in-chief, specifically retains command authority over all United States armed forces deployed in Macedonia. ... The chain of command, from President to the United States armed forces commander in the field, remains inviolate." Trial Record at 426-27. Thus, even if petitioner could adduce authority to

support his theory of unconstitutional delegation, it would be unsupported by the facts in this case. Petitioner's Commander-in-Chief clause objection to the deployment order therefore fails.

c. *Thirteenth Amendment*

Petitioner's final challenge to the deployment order is that the order forced him into service as a "United Nations fighting person," rather than the "United States soldier" he had agreed to serve as, in violation of the *Thirteenth Amendment* prohibition on involuntary servitude. Petitioner argues that this challenge does not present a political question under *Bailey v. Alabama, 219 U.S. 219, 55 L. Ed. 191, 31 S. Ct. 145 (1911)*; *Butler v. Perry, 240 U.S. 328, 60 L. Ed. 672, 36 S. Ct. 258 (1916)*; and *Selective Draft Law Cases, 245 U.S. 366, 390, 62 L. Ed. 349, 38 S. Ct. 159 (1918)*. See Pl's. Mot. Reopen at 31-32. The Court agrees with petitioner in this respect. Because this challenge implicates not the authority of the President to order the deployment of U.S. forces under the Constitution but petitioner's personal right not to be forced into involuntary servitude, it does not present a nonjusticiable political question. Neither, however, does it constitute a meritorious claim under the *Thirteenth Amendment*.

Petitioner cites cases demonstrating that the courts do, from time to time, consider *Thirteenth Amendment* defenses to the enforcement of criminal laws; he does not, however, adduce any authority for the proposition that service in the United States military, but under the auspices of an international organization, might constitute involuntary servitude. Indeed, the very cases cited by petitioner indicate that even compulsory military service is generally outside the scope of the *Thirteenth Amendment*:

> [The *Thirteenth] amendment* was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.

Butler v. Perry, 240 U.S. at 332-33. See also *Selective Draft Law Cases, 245 U.S. at 374* ("The *Thirteenth Amendment* was intended to abolish only the well-known forms of slavery and involuntary servitude akin thereto, and not to destroy the power of the Government to compel a citizen to render public service.").

If the *Thirteenth Amendment* presents no obstacle to compelled military service in the interest of the government, it can hardly be said to bar service that is voluntarily assumed, but discharged under command arrangements the soldier finds disagreeable. Even assuming for the sake of argument that the deployment would have rendered petitioner a "United Nations fighting person," for *Thirteenth Amendment* purposes there is no difference between service under the flag of the United States and service under the flag of an international organization, but ordered by and ultimately in the service of the

United States. The Court accordingly finds petitioner's challenge to the deployment order under the *Thirteenth Amendment* to be without merit.

3. Counts III & IV: Lawfulness of Uniform Order

Counts III and IV of the Second Amended Complaint challenge the military judge's finding that the uniform order did not violate the Foreign Emoluments Clause of the United States Constitution, *U.S. Const., Art. I § 9, cl. 8*. See 2d. Am. Compl. PP45-56. n14 Count III asserts that, by submitting a "stipulation of fact" to the military judge establishing that the uniform modifications had not been approved by the Army's Director of Heraldry, the Department of Defense, or the Department of the Army, petitioner established a *prima facie* case of a violation of the Foreign Emoluments Clause. Petitioner argues that by denying his motion to dismiss, the military judge did not afford petitioner "a full and fair opportunity" to litigate his claim on the merits. See 2d. Am. Compl. P49; Opp. at 31. Alternatively, Count IV claims that the military judge's finding that the U.N. patch and cap did not violate Army uniform regulations "lacks 'fair support' in the record, or in the alternative, constitutes an unreasonable determination of the facts in light of the evidence presented in the court-martial proceedings." 2d. Am. Compl. P53. This erroneous factual determination (and its affirmance by the ACCA and the CAAF), petitioner claims, constituted an "unfair" adjudication of his Foreign Emoluments Clause challenge to the uniform order.

n14 The clause reads, in its entirety: "No title of nobility shall be granted by the United States: and no person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title of any kind whatever from any King, Prince, or foreign State."

Petitioner in essence asks this Court to re-weigh the evidence presented to the trial judge. That petitioner characterizes the military judge's evidentiary finding as "unfair" does not allow him to circumvent the basic principle that courts considering habeas corpus challenges to court-martial convictions are not free to revisit the military courts' evidentiary rulings or findings of fact. See *Burns v. Wilson, 346 U.S. at 142, 144.* The military judge found petitioner's factual proffer insufficient to rebut the presumption of lawfulness that attaches to military orders; it is not for this Court to disturb that finding. Even if petitioner advanced some legal argument as to why the uniform order violated the Army regulations, this is not a claim of fundamental error amenable to review by habeas corpus.

Petitioner's only constitutional claim - supported neither by precedent nor by argument - is that the uniform order would have forced him to accepts emoluments from a foreign government, in violation of the Foreign Emoluments Clause. n15 This argument was extensively litigated at trial, see *New I, 50 M.J. at 736*, and raised and rejected on appeal; it was thus fully litigated in the military courts. Petitioner has offered (and there appears to be) no Supreme Court precedent defining the scope and application of the clause; thus it cannot be said that the military courts' decision that there was no constitutional violation was inconsistent with "Supreme Court standards." n16 The Court therefore will not second-guess the military courts' rejection of petitioner's Foreign Emoluments Clause challenge.

n15 In his petition to reopen proceedings, petitioner asserts that the Emoluments Clause challenge to the

uniform order raised in his motion to dismiss the charges actually relied not on the "emoluments" part of the clause, but on the argument that the order unconstitutionally forced petitioner to assume a "foreign office." Pl's. Mot. Reopen at 34. Petitioner abandoned that argument in his Second Amended Complaint, and on review of the petitioner's motions to the court-martial, the Court can locate no record of such an argument having been made. In any event, the Court believes this argument to be factually and legally groundless.

n16 In any event, in the judgment of this Court the uniform order does not violate the plain language of the Emoluments Clause. Assuming *arguendo* that the United Nations is a "foreign state" and that the uniform accouterments were actually issued by the United Nations, neither the patches nor the cap qualifies as an "emolument," which is defined as "The profit arising from office, employment, or labor ... any perquisite, advantage, profit, or gain arising from the possession of an office." BLACK'S LAW DICTIONARY 524 (6th ed. 1991). Although the uniform accouterments provided some safety benefits, they conferred no "profit" or "gain" on the soldiers to whom they were issued.

III. CONCLUSION

Each of petitioner's challenges to his court-martial conviction either is outside the scope of collateral review, presents a nonjusticiable political question, or is without merit as a matter of law. Petitioner's complaint therefore fails to state a claim upon which relief may be granted. Therefore,

respondents' motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* must be granted.

An Order consistent with this Opinion will issue this same day.

PAUL L. FRIEDMAN

United States District Judge

DATE: December 22, 2004

United States, ex rel Michael G. New, Appellant v. Donald H. Rumsfeld, Secretary of Defense and Francis J. Harvey, Secretary of the Army, Appellees

No. 05-5023

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2006 U.S. App. LEXIS 21373

August 17, 2006, Filed

JUDGES: BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of Michael G. New's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 99-0640

United States, Appellee v. Michael G. New, Specialist, U.S. Army, Appellant

55 M.J. 95

February 4, 2000, Argued

June 13, 2001, Decided

DISPOSITION: Decision of the United States Army Court of Criminal Appeals affirmed.

COUNSEL: For Appellant: Henry L. Hamilton (argued); Major Norman R. Zamboni (USAR) and Captain Blair T. O'Connor (on brief).

For Appellee: Captain Kelly D. Haywood (argued); Colonel Russell S. Estey, Lieutenant Colonel Eugene R. Milhizer, and Major Patricia A. Ham (on brief).

JUDGES: CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE and EFFRON, JJ., joined. EFFRON, J., filed a concurring opinion. SULLIVAN, J., filed an opinion concurring in the result. EVERETT, S.J., filed an opinion concurring in part and in the result.

OPINION: Chief Judge CRAWFORD delivered the opinion of the Court.

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FACTS

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I. Denial of a Challenge for Cause

II. Consideration of the Legality of an Order as a Question of Law

III. Legality of the Order

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Contrary to his pleas, appellant was convicted by a special court-martial consisting of officer and enlisted members of failure to obey an order to wear his U.S. Army uniform modified with United Nations (UN) accoutrements, in violation of Article 92(2), Uniform Code of Military Justice, 10 USC § 892(2). Appellant's sentence to a bad-conduct discharge was approved by the convening authority. The Court of Criminal Appeals affirmed the findings and sentence. 50 M.J. 729 (1999). We granted review of the following issues:

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S CAUSAL CHALLENGE AGAINST A COURT-MARTIAL MEMBER WHO PREVIOUSLY ORDERED A SUBORDINATE TO DEPLOY TO MACEDONIA.

II. WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO BE TRIED BY COURT-MARTIAL MEMBERS AND TO HAVE THE MEMBERS DETERMINE WHETHER THE

GOVERNMENT HAS PROVED EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT WERE VIOLATED BECAUSE THE MILITARY JUDGE RULED THAT THE ORDER GIVEN TO APPELLANT WAS LAWFUL WITHOUT SUBMITTING THE ISSUE TO THE MEMBERS, AND BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT THE ORDER WAS LAWFUL AS A MATTER OF LAW.

III. WHETHER THE MILITARY JUDGE ERRED BY FINDING THAT THE ORDER TO DEPLOY IN THE UNITED NATIONS UNIFORM WAS LAWFUL.

IV. WHETHER THE MILITARY JUDGE ERRED BY AVOIDING THE QUESTION OF THE LAWFULNESS OF THE ORDER AND HOLDING THAT LAWFULNESS WAS A NONJUSTICIABLE POLITICAL QUESTION.

For the reasons set forth below, we affirm the decision of the Court of Criminal Appeals.

FACTS

In 1992, the UN established a Protective Force (UNPROFOR) in the Former Yugoslavian Republic of Macedonia (FYROM). The United States contributed troops to this force in 1993 and, in 1995, this force was redesignated as the UN Preventive Deployment Force (UNPREDEP).

In August of 1995, 1st Battalion, 15th Infantry Regiment, 3d Infantry Division (1/15 Infantry) was ordered to assume the FYROM UNPREDEP mission as of November 1, 1995. Appellant, a medic, was attached to a squad of Company A, 1/15 Infantry. Appellant expressed concern about wearing the

UN accoutrements on his U.S. uniform. 50 M.J. at 733-34. Specifically, uniform modifications included in part the UN blue beret and field cap, a UN blue shoulder patch, blue scarf, and UN badge and identification card to be issued in the FYROM. Id. at 734 n.7. On August 23, 1995, appellant was ordered to do research on the history and objectives of the UN and submitted a written statement of his position at the suggestion of his command. He stated that he could not assess the legality of the order to wear the modified uniform because he did not "understand the legal basis" of the order.

Appellant's concerns were discussed by his father on the Internet and were reported in the popular media and noted by several members of Congress. Appellant's noncommissioned officer leadership, company commander, and battalion commander each spoke with him to alleviate his doubts about the legality of the UNPREDEP mission and the uniform modification. Appellant did not inform anyone in his chain of command that he believed that the UN accoutrements conflicted with Army Regulation (AR) 670-1, Wear and Appearance of Army Uniforms and Insignia (1 September 1992).

Prior to deployment, the unit was granted leave and appellant visited Washington, D.C. In Washington, he met with his future counsel and with several legislators who were concerned about the legality of the UNPREDEP mission and about President Clinton's representations to Congress.

On October 2, 1995, the unit was briefed by the battalion commander on the legality of the FYROM UNPREDEP mission, but not on specific battle dress uniform (BDU) modifications. The unit was ordered to wear the modified uniform starting on October 10. 50 M.J. at 734. Appellant's company commander, Captain (CPT) Palmateer, reissued these orders at a company formation. Appellant turned in the required two sets of BDUs to be altered.

At the next formation, appellant reported in unaltered BDUs and was removed from the formation. Two hours later, he was given a "second chance" to comply with the order by Lieutenant Colonel (LTC) Layfield and refused. Appellant was then declared non-deployable. 50 M.J. at 735. The order and his responses formed the basis for the charge of disobedience that is the subject of the present appeal.

DISCUSSION

ISSUE I - DENIAL OF A CHALLENGE FOR CAUSE

During individual voir dire, a court-member, Colonel (COL) Dana F. Kwist, was asked whether he had "sent people to operations where they had to wear the blue beret." He responded as follows to questions by one of his civilian defense counsel (CDC2):

COL KWIST: I have a captain in Macedonia that's the headquarters commandant down there. I'm not certain if they're wearing it in Northern Iraq, but I have a captain that's attached down there, as well.

CDC2: Okay. And did you--what, if any, opinion do you have about wearing that blue beret, as you sent two soldiers to do?

COL KWIST: Well, I don't know that I've ever formed an opinion. I don't really think about it.

CDC2: Do you think about it?

COL KWIST: No, I don't.

CDC2: Well, I mean, do you--you obviously sent two of your subordinates to do that, and the gist of this order--you've read the flyer there--is that somebody disobeyed that. Doesn't that

put them at odds, basically, with a decision that you've already made concerning the very same matter?

COL KWIST: I just don't think about it like that. This comes down as a tasking from our corps headquarters, and I fill squares based on the taskings. No, I don't get into that conversation or--at all.

Following voir dire, the defense challenged COL Kwist for cause partly "because he has a captain ... in Macedonia on the very mission that this pertains to."[1] In response, trial counsel argued:

And, as to his soldiers, he's merely doing what he's required to do, and that is receiving an order, executing it, and transmitting it. There is no indication that any of those soldiers raised the issues that the accused raised to him. He wasn't confronted with this issue in sending his soldiers on these deployments. Soldiers obey orders. That's the general rule. And every one of these members of the panel obeys orders, and if they obey an order, that's not a basis for them now to be challenged just because what's at issue in this case is disobeying an order.

The military judge denied this causal challenge, stating that he adopted trial counsel's argument.

Appellant asserts that COL Kwist demonstrated actual and implied bias because he had a personal and professional interest in the result of appellant's trial inasmuch as the challenged member gave precisely the same order as appellant was accused

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[1] Appellant also challenged COL Kwist because he read newspaper articles concerning this case. The granted issue, however, only addresses that part of appellant's objection concerning COL Kwist's having ordered a subordinate to deploy to Macedonia. Hence, our review is limited by the granted issue.

of disobe[illegible]. The Government argues that the defense failed to demonstrate any actual bias by COL Kwist and that appellant waived any claim of implied bias by failing to challenge COL Kwist on that basis at trial.

As we noted in *United States v. Ai*, 49 M.J. 1, 4 (1998), a servicemember has a "right to impartial court-members to decide his guilt." We have also noted that RCM 912(f)(1)(N), Manual for Courts-Martial, United States (1995 ed.), codifies a general ground for challenge" which includes both actual and implied bias. *United States v. Minyard*, 46 M.J. 229, 231 (1997).[2] The Rule's discussion notes examples of grounds for challenge as including, "a direct personal interest in the result of the trial." Further, RCM 912(f)(3) provides: "The burden of establishing that grounds for a challenge exist is upon the party making the challenge."

First, we turn to the question whether appellant established actual bias. "The test for actual bias [in each case] is whether any bias is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Warden*, 51 M.J. 78, 81 (1999)(internal quotation marks omitted).

COL Kwist's testimony during individual voir dire gave no indication that he would be unable to "yield to the evidence presented and the judge's instructions." When asked whether someone who refused to wear the blue beret would be at odds with him because he had ordered two of his soldiers to deploy to areas potentially requiring them to wear blue berets, he responded: "I just don't think about it like that. This comes down as a tasking from our corps headquarters, and I fill squares based on the taskings. No, I don't get into that

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[2] RCM 912(f)(1)(N) states that a member should be excused when it appears that the person "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

conversation or--at all." Moreover, COL Kwist indicated during group voir dire conducted by the military judge that he would base his decision on the evidence presented and the judge's instructions.

"Actual bias is a question of fact" which "is reviewed subjectively, through the eyes of the military judge of the court members." *Warden*, 51 M.J. at 81 (internal quotation marks omitted). The evaluation of the potential member's mental state is most important:

> Where. . .the totality of the circumstances indicate ... that a member is genuinely open to considering all mitigating and extenuating factors which are relevant to a just sentence before arriving at a fixed conclusion, a military judge has broad discretion to grant or deny challenges.

United States v. Rockwood, 52 M.J. 98, 106 (1999) (emphasis in original). Applying this standard, we hold that the military judge did not err in denying the challenge for cause on the basis of actual bias.

Next, we turn to the question of whether appellant established implied bias. "Implied bias is viewed through the eyes of the public," and "the focus is on the perception or appearance of fairness of the military justice system." *Warden*, 51 M.J. at 81 (internal quotation marks omitted).

Appellant argues that COL Kwist would be biased in that he would "lose face" unless appellant were convicted because the legitimacy of his own order would be questioned. COL Kwist's testimony reveals a position quite contrary to appellant's assertion. He indicated that because of the lack of controversy, he did not view the matter personally but rather as merely "filling squares based on the taskings" from "corps headquarters." As a practical matter, all officers who sit on courts-martial have given or received orders of all kinds as a standard part of military life. It is unlikely that the public would

view all officers or all enlisted personnel who have ever given an order as being disqualified from cases involving disobedience of orders that are similar to any they may have given in the past. Such a standard would make it virtually impossible to find members to sit on cases involving disobedience of orders.

Although "we give the military judge less deference on questions of implied bias," we hold that there was no error under these facts. *Warden*, 51 M.J. at 81, citing *United States v. Youngblood*, 47 M.J. 338, 341 (1997).

ISSUE II - CONSIDERATION OF THE LEGALITY OF AN ORDER AS A QUESTION OF LAW

This case involves some of the most difficult choices that may confront our Government and our men and women in uniform. Faced with increasing instability in the Balkans, the United States had to decide whether to deploy U.S. troops in support of the peacekeeping effort in the former Yugoslavian Republic of Macedonia, how to structure command and control relationships with other national and international forces in the area, what types of orders were needed to implement those relationships, and how to dispose of alleged violations of such orders. Appellant had to decide whether he should voice his opposition to those decisions, how to do so, and whether to obey orders that he viewed as unlawful.

Appellant chose to manifest his opposition through disobedience of an order from his commander, and he challenged the legality of that order at his court-martial. He now asks this Court to create an exception to the requirement that the military judge decides questions of law where, as in this case, appellant claims the question of law is an element of the alleged offense. So framed, the issue requires us to make a choice and decide whether lawfulness of the order was a legal question for the military judge or an element that should have

been submitted to the members. There are respectable arguments on both sides of the question.

This Court reviews the question of whether the military judge correctly determined that the issue was a question of law on a de novo standard of review. For the reasons set forth below, we hold that lawfulness of an order, although an important issue, is not a discrete element of an offense under Article 92. We further hold that, in this case, the military judge properly decided the issue of lawfulness as a question of law. See Art. 51(b), UCMJ, 10 USC § 851(b).

Military personnel are obligated to obey lawful orders and regulations. Arts. 90, 91, and 92, UCMJ, 10 USC §§ 890, 891, and 892, respectively. The term "lawful" recognizes the right to challenge the validity of a regulation or order with respect to a superior source of law.

A "regulation" is an "authoritative rule or principle ...." The term includes "a rule or order having the force of law issued by an executive authority of a government usually under power granted by a constitution or delegated by legislation. ..." Webster's Third New International Dictionary 1913 (1981). An "order" means a "rule or regulation made by competent authority;" "an authoritative mandate usually from a superior to a subordinate;" and "a written or oral directive from a senior military or naval officer to a junior telling him what to do but giving him certain freedom of action in complying." Id. at 1588 (emphasis added).

The role of what is now the military judge (MJ) in ruling on questions of law was discussed during the 1949 House hearings that preceded enactment of the UCMJ. During the hearings, Congressman DeGraffenried asked whether a ruling by a law officer (now MJ) on a question of law would be binding on the court members. Mr. Larkin, a Department of Defense witness, see 33 MJ [XI, responded:

It is absolutely binding, except for the fact of course that any member of the court whether he is a lawyer or otherwise may for his own personal reason not follow them, which is a situation that obtains in any court in the land. The judge may rule on the questions of law and he may instruct the jury and charge them and as it happens the jury goes out and pays no attention to them whatever. But that is something over which no one has any control in any tribunal.

Mr. DeGraffenfried. He acts as the judge on questions of law?

Mr. Larkin. That is right. He acts as an outright judge on questions of law and his rulings are final and binding. Whether any individual person decides that he doesn't want to follow them or not of course is a different problem.

Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm. (hereafter Hearings), 81st Cong., 1st Sess. 1154 (1949).

As a result of these and other hearings, the Code was passed by Congress. By statute, "the military judge ... shall rule upon all questions of law and all interlocutory questions arising during the proceedings." Art. 51(b), UCMJ, 10 USC § 851(b). The Manual for Courts-Martial provides that the military judge shall, "subject to subsection (e) of this rule [regarding finality of rulings], rule on all interlocutory questions and all questions of law raised during the court-martial." RCM 801(a)(4).

In *United States v. Carson*, 15 U.S.C.M.A. 407, 408, 35 C.M.R. 379, 380 (1965), our Court noted in dicta that the legality of an order in a disobedience case is an issue of law, as follows:

Whether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact for determination by the triers of fact. For example, in a

prosecution for disobedience of an order, in violation of Article 92, Code, supra, 10 USC § 892, the court-martial must determine whether the order was given to the accused, but it may not consider whether the order was legal or illegal in relation to a constitutional or statutory right of the accused.

Paragraph 57b, Manual for Courts-Martial, United States, 1969 (Revised edition), expressly treated the legality of an order in a disobedience case as a question of law to be decided by the military judge. See U.S. Dep't of the Army, Pam. No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition (1970), at 10-5 (citing Carson). The provisions of the 1969 Manual have been carried forward in this Discussion accompanying RCM 801(e)(5) in the current Manual:

> Questions of law and interlocutory questions include all issues which arise during trial other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments. A question may be both interlocutory and a question of law. ...
>
> Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. ...

(Emphasis added.) See Art. 51(b)(the rulings of a military judge are final on "all questions of law," as well as "all interlocutory questions," except for "the factual issue of mental responsibility"). See RCM 801(a)(4); RCM 801(e)(1); RCM 801(e)(4) Discussion; cf. RCM 801(e)(2)(B)(in contrast to the

rulings of the military judge, the rulings of the president of a special court-martial without a military judge are not final with respect to interlocutory questions of fact). See also RCM 801(e)(5) Discussion.

Judge Sullivan concludes that the issue of lawfulness in this case was an element that the military judge had to submit to the members. We have several significant points of disagreement with that conclusion and with everal points raised by his separate opinion.

First, although he asserts that his approach represents a "modern military legal practice," ___ MJ at (3), this Court has never held that "lawfulness" is an element that must be submitted to the members. At most, the cases cited in his separate opinion reflect isolated dicta or descriptions of circumstances in which predicate factual issues were submitted to the members. None of the cases cited by the separate opinion presented an issue in which this Court was required to determine the relative responsibilities of the military judge and the members with respect to deciding lawfulness of an order. In fact, before the Supreme Court's 1995 decision in Gaudin, we were not compelled to choose in a case such as this between treating lawfulness as an issue of law for the military judge or an element for the members. Prior to Gaudin, the Supreme Court had permitted trial judges to resolve certain legal issues without determining whether the Sixth Amendment required such issues to be submitted to a jury as an element. See, e.g., *Sinclair v. United States*, 279 U.S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929). As we consider the issue whether lawfulness is an element of the offense of disobedience under Article 92, we note that the ambiguities in the Benchbook, lower court opinions, and dicta in our prior decisions reflect the pre-Gaudin era in which it was not necessary to resolve that issue. The case before us represents the first time, subsequent to Gaudin, that

we must answer the question whether lawfulness is an element that must be submitted to the members.

Second, we do not agree that *Unger v. Ziemniak*, 27 M.J. 349 (CMA 1989), controls the present case. As the separate opinion notes, Unger contains language suggesting that "in a prosecution for disobedience, lawfulness of the command is an element of the offense." Id. at 358. There are critical differences, however, between Unger and the present case. The issue presented to our Court in Unger did not involve a dispute as to whether lawfulness is a discrete element, nor did the case require us to determine the appropriate division of responsibilities between the military judge and the members in a disobedience case.

Unger involved a pure question of law. Unger had submitted pretrial motions seeking dismissal of charges on the ground that the order for her to submit to a urinalysis examination was illegal as a matter of law. The military judge rejected the motions, and Unger sought appellate review through a request for extraordinary relief, which the court below denied. We in turn affirmed that decision. See 27 M.J. at 350, 359. After concluding that the military judge correctly rejected the motions to dismiss the charges, the opinion in Unger ventured beyond the issue on appeal and suggested how the issue might be addressed "if" there was a trial, indicating that lawfulness was an element to be decided by the members. The Unger opinion did not discuss Carson and provided only the most cursory rationale for the suggestion that lawfulness was an element to be decided by the members. Viewed in that context, the language in Unger does not carry the weight that we would accord a decision directly addressing a controversy briefed by the parties. That aspect of Unger has not been followed, and there is nothing in the opinion which persuades us that we should reject the longstanding approach of the Manual.

Third, we disagree with the separate opinion's suggestion that lawfulness of an order must be treated as an element of a disobedience offense as a matter of constitutional law. __ MJ (9). The Supreme Court has made clear that in a prosecution for violation of an order or regulation, the Constitution does not require that the validity of the order or regulation be decided by a jury. For example, in *Cox v. United States*, 332 U.S. 442, 92 L. Ed. 59, 68 S. Ct. 115 (1947), both the plurality (id. at 452-53) and the dissent (id. at 455) agreed that the validity of the regulation was an issue of law. (Douglas and Black, JJ:, dissenting), but agreeing with the plurality that the issue of validity was a question "of law"). See generally *Yakus v. United States*, 321 U.S. 414, 433, 444-48, 88 L. Ed. 834, 64 S. Ct. 660 (1944)(Congress may require challenges to the validity of a regulation governing wartime price controls to be made in the context of a civil proceeding, thereby precluding a defendant from asking the judge, as well as the jury, to rule on the validity of the regulation in a criminal prosecution for violation of the regulation).

Fourth, we do not agree with the separate opinion's reliance on Winthrop's classic treatise, W. Military Law and Precedents (2d ed. 1920 Reprint), for the proposition that lawfulness is an element that must be submitted to a "military jury." ___ MJ at (9). Courts-martial in Winthrop's day did not simply function as a civilian "jury"; they consisted solely of members – there was no equivalent of a military judge -- and the members performed the duties of both judge and jury. See Winthrop, supra at 54-55. It was not until 1951 that courts-martial included law officers who presided with the authority to rule finally on matters of law and did not also serve as members of the panel. See 1 F. Gilligan & F. Lederer, Court-Martial Procedure § 14-10.00 at 544-45 (2d ed. 1999); *United States v. Norfleet*, 53 M.J. 262, 266 (2000). Thus, until 1951, rulings on all legal issues in the Army, including rulings on motions, were

made by the president of the court-martial or the law member (Article of War[3] (AW) 8 (1920)), subject to the objection of the other members (see AW 31 (1920)). The material from Winthrop quoted at length simply reflects Winthrop's understanding that an accused had the opportunity to challenge the validity of regulations before a court-martial -- a body that acted as both judge and jury. The material in Winthrop does not demonstrate that the issue of validity was treated as an element with the Government bearing the burden of proof. Instead, Winthrop made clear that the court-martial should employ traditional legal analysis, applying the presumption of a regulation's validity, to be overturned only if clearly contradicted by other established authority. Id. at 575-76.[4]

Our fifth point of disagreement involves the differences between a court-martial panel and a civilian jury. The Sixth Amendment right to trial by jury does not apply to courts-martial. *Ex Parte Quirin*, 317 U.S. 1, 39-45, 87 L. Ed. 3, 63 S. Ct. 2 (1942); see also *United States v. Loving*, 41 M.J. 213,

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[3] The Navy and Marines were governed by the Articles for the Government of the Navy, W. Generous, Swords and Scales 10-11 (1973), and did not have a "law officer until 1951. Hearings, supra [__ MJ at (12)] at 1153.

[4] Similar considerations apply with respect to W. De Hart, Observations on Military Law and the Constitution and Practice of Courts-Martial (1846), cited in the separate opinion, ___ MJ at (9-10), which was published a half-century before the 1896 original publication of Winthrop's second edition. The separate opinion also relies on J. Snedeker, Military Justice Under the Uniform Code 599 (1953), ___ MJ at (9). Snedeker's discussion of lawfulness is not based upon any decisions under the Uniform Code of Military Justice requiring the military judge to treat lawfulness as an element rather than as a question of law. The sole citation in Snedeker is to a pre-UCMJ 1945 court-martial, see id. at 599 n.50, which involved the routine issue as to whether an order was lawful, and did not address the allocation of responsibilities between the court-martial and the law officer or military judge -- a position that had not been established in 1945.

285, 287 (1994), aff'd on other grounds, 517 U.S. 748, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996); *United States v. Curtis*, 32 M.J. 252, 267 (CMA), cert. denied, 502 U.S. 952, 116 L. Ed. 2d 354, 112 S. Ct. 406 (1991). Accused servicemembers are tried by a panel of their superiors, not by a jury of their peers. Court-martial members are not randomly selected, but instead are chosen by the commander who convenes the court-martial on a "best qualified" basis. See Art. 25(d)(2), UCMJ, 10 USC 825(d)(2); *United States v. Tulloch*, 47 M.J. 283, 285 (1997).

Although the court-martial members perform many of the functions of a jury with respect to the determination of guilt or innocence, throughout most of our history, the court-martial panel has served as both judge and jury. Even today, the UCMJ retains provisions for special court-martial members to serve as both judge and jury, with power to adjudicate a sentence of up to one year's[5] confinement. If a military judge cannot be detailed "because of physical conditions or military exigencies," the members of a special court-martial may act as

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[5] Art. 19 provides in part:

Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter [10 USCS §§ 801 et seq.] except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title [10 USCS § 827(b)] (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

both judge and jury in a case that results in a punitive discharge and up to 12 months' confinement. Art. 19, UCMJ, 10 USC § 819 (as amended Oct. 5, 1999). These provisions and the historical functions of a court-martial panel underscore our conclusion that when Congress inserted the word "lawful" in the statutes governing disobedience, it was addressing the judicial role of the court-martial panel rather than creating an element for consideration by a factfinder.

Sixth, we do not agree that application of the principles in *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995), requires that lawfulness of a regulation or order, in terms of its relationship to other provisions of law, be treated as an element of a disobedience offense. The underlying principle in Gaudin -- that the judge must instruct the jury on the elements of the offense -- is not a matter in controversy because it is well established by statute in the Uniform Code of Military Justice. See Art. 51(c)(setting forth the relationship between the military judge and the court-martial panel on elements and instructions). Thus, although the Supreme Court found it necessary to resort to constitutional principles in Gaudin, the allocation of responsibilities may be addressed as a matter of statutory interpretation in the military justice system.

The question in the present case is not whether the military judge must instruct the court-martial panel on the elements of an offense. That question is resolved by Article 51(c). Accordingly, treatment of the constitutional issues discussed in Gaudin does not control the present case. The question before us is a matter of statutory interpretation -- whether, in this case, the issue of lawfulness was an element, and therefore should have been submitted to the members under Article 51(c); and if not an element, whether the military judge properly decided the issue of lawfulness as a question of law under Article 51(b). In that regard, it is noteworthy that Gaudin focused on the

interpretation of a unique statute and did not purport to set forth general principles of interpretation applicable to all statutes. Moreover, in Gaudin, there was no dispute as to whether the word "material" constituted an element because the Government "conceded" that point. Id. at 511. Both sides also agreed on the definition of "materiality," i.e., that "the statement must have a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." 515 U.S. at 509 (internal quotation marks omitted).[6]

The present case initially involves the question of whether it is necessary to consider lawfulness of an order as a separate and discrete element under Article 92. Inclusion of the word "lawful" in Article 92 did not add a separate element to the offense of violating a regulation or order. The word "lawful" reflects a question of law -- the validity of the regulation or order with respect to a superior source of law -- that is inherent in the terms "order" and "regulation" under Article 92.[7] The word "lawful" simply reinforces the opportunity for the accused to challenge the validity of the regulation or order with respect to a superior source of law without establishing a separate and

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[6] In *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), the Supreme Court again addressed "materiality," in the context of mail fraud, wire fraud, and bank fraud, under 18 USC § § 1341, 1343, and 1344. The Neder opinion makes clear that materiality is a fact laden concept and includes a finding of fact that "a reasonable man would attach importance" to the matter or "the maker of the representation knows or has reason to know ... the matter is important." 527 U.S. at 22 n.5, citing Restatement (2d) of Torts § 538 (1976).

[7] Winthrop recognized that point when he noted, "The word 'lawful' is indeed surplusage, and would have been implied from the word 'command' alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command not lawful may be disobeyed...." Winthrop, supra, at 575.

distinct element of the offense. In light of the legislative history of the Code and the Manual, we conclude that "lawfulness" is a legal question for the judge. It is entirely different from many other matters which must be submitted to the court members such as "wrongfulness" or "materiality" if a servicemember is charged with a violation of 18 USC §§ 1001 under Article 134, UCMJ, 10 USC § 934. Adjudicating the issue of lawfulness as a question of law for the military judge ensures that the validity of the regulation or order will be resolved in a manner that provides for consistency of interpretation through appellate review. By contrast, if the issue of lawfulness were treated as an element that must be proved in each case beyond a reasonable doubt, the validity of regulations and orders of critical import to the national security would be subject to unreviewable and potentially inconsistent treatment by different court-martial panels.

Seventh, we note a significant internal contradiction in Judge Sullivan's approach. The separate opinion asserts that "lawfulness of an order" is "an essential element of a disobedience offense," __ MJ at (2), and takes note of "the basic constitutional right of a criminal defendant 'to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.'" __ MJ at (27) (citing Gaudin, supra 515 U.S. at 522-23) internal quotation marks omitted (emphasis added in the separate opinion). The separate opinion also notes that "a military accused has a codal and constitutional right to have members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense of which he is charged." __ MJ at (12) (footnote omitted). Elsewhere, however, the separate opinion endorses the proposition that the military judge may treat "lawfulness" in a disobedience case as a question of law and that the military judge properly did so in the present case, at least with respect

to most of the issues raised by appellant. See __ MJ at (2, 6). We cannot have it both ways. This case requires us to decide, with respect to regulations and orders under Article 92, whether "lawfulness" is a discrete element or whether it is a question of law. If "lawfulness" is indeed an "essential element," the accused in a military trial has a statutory right for the issue to be resolved by the members under Article 51. If, however, "lawfulness" is a question of law, it may be resolved by the military judge. The cases cited in the separate opinion, __ MJ at (6), support the role of the military judge in deciding issues of law, but do not authorize the military judge to withhold "essential elements" from the members. If we agreed that as a matter of statutory interpretation "lawfulness" established a discrete "essential element," we would hold that the issue should have been submitted to the members. Because we conclude in this case that "lawfulness" is a question of law, the military judge did not err by resolving it himself without submission to the members.

Finally, we do not agree with Judge Sullivan's assessment of the impact of any error. The separate opinion asserts that the issue of lawfulness of an order was "an essential element of this criminal offense," ___ MJ at (21); that it was an error of constitutional dimension for the military judge to decide this issue without submitting it to the members; and that the error was so egregious that it constituted a "radical departure from our political, legal, and military tradition." __ MJ at (2). The separate opinion nonetheless concludes that these considerations are of no moment because, in his view, the order was lawful, and any misstep by the military judge was harmless under *Neder*, 527 U.S. at 4. ___ MJ at (37).

As noted above, if Judge Sullivan is correct in his assertion that lawfulness is an element that must be submitted to the members, we -- as an appellate court -- would have no more authority than the military judge to render a decision without

requiring further proceedings to submit it to the members. Judge Sullivan's analysis of the order, which embodies the characteristics of judicial reasoning on an issue of law, underscores our conclusion that the issue at trial was a question of law for resolution by the military judge, rather than an element of an offense requiring a factfinding panel or jury to weigh the evidence.

Judge Sullivan's conclusion that this is a harmless-error case is inconsistent with Neder, which provided that omission of an element could be viewed as harmless only when "supported by uncontroverted evidence" on the question of materiality in tax-fraud charges. 527 U.S. at 18. If, as Judge Sullivan suggests, the issue of "lawfulness" of an order is a matter which involves introduction of evidence to be weighed by the members, appellant clearly produced at trial a large volume of material contesting the lawfulness of the order. Had this been a question for the members of the court-martial panel, it would have been within their province to analyze the controverted material and reach a judicially unreviewable decision to acquit appellant. Similar considerations apply to Senior Judge Everett's separate opinion on this point. Both opinions apply Neder in a manner that discounts the large volume of material submitted by appellant contesting the lawfulness of the order, which would be more than sufficient to go before a panel if this were an element for resolution by the members. In rejecting that material, they effectively treat the question as a matter of law rather than as an element of an offense. As a result, both reach the conclusion -- with which we agree -- "that the order to wear the UN patches and cap was lawful, i.e., it was properly authorized, related to a military duty, and violated no applicable service uniform regulations." __ MJ at (37).

ISSUE III - LEGALITY OF THE ORDER

This Court reviews the question of whether the military judge correctly determined that an order was lawful on a de novo basis. *United States v. Padgett*, 48 M.J. 273, 277. The test for assessing the lawfulness of an order under Article 92 comes from paragraph 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, United States (1995 ed.) which states in pertinent part:

The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.

See *United States v. Hughey*, 46 M.J. 152, 154 and n.2 (1997). Orders are clothed with an inference of lawfulness. See *Hughey*, 46 M.J. at 154; *United States v. Nieves*, 44 M.J. 96, 98 (1996). "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime." Para. 14c(2)(a)(i), Part IV, Manual, supra (1995 ed.). Appellant has the burden to establish that the order is not lawful. *Hughey*, 46 M.J. at 154; *United States v. Smith*, 21 U.S.C.M.A. 231, 234, 45 C.M.R. 5, 8 (1972).

We hold that the military judge did not err in determining that the order given to appellant to wear his uniform with UN accoutrements was lawful. The military judge correctly determined that the evidence presented by appellant did not overcome the presumption of lawfulness given to military orders and that the order related to military duty.

Appellant argues that (1) the UN insignia violates Army uniform regulations (AR 670-1) by transferring his allegiance to the *United Nations*, 50 M.J. at 734, and (2) the order stems from an illegal deployment of the Armed Forces because President Clinton misrepresented the nature of the deployment to Congress and failed to comply with the United Nations Participation Act [UNPA].[8] 50 M.J. at 736. These arguments fail because they would unacceptably substitute appellant's personal judgment of the legality of an order for that of his superiors and the Federal Government.

This Court has held that an Air Force Captain disobeyed a lawful order when he refused to fly as a training instructor on a fighter plane that was used in Vietnam. *United States v. Noyd*, 18 U.S.C.M.A. 483, 485-86, 40 C.M.R. 195, 197-98 (1969). The Noyd court noted that "military service is ... a matter of status," like becoming a parent, rather than just a contractual relationship and that status establishes special duties between the soldier and the Government. 18 U.S.C.M.A. at 490, 40 C.M.R. at 202. It further noted that "the fact that a person in a military status determines that he has undergone a change of conscience does not, at that instant and from that time on, endow him with the right to decide what orders are compatible with his conscience." 18 U.S.C.M.A. at 491, 49 C.M.R. at 203.

The Supreme Court has recognized the importance of the military mission over the beliefs of the individual soldier on the specific issue of uniform requirements. The Court held that Air Force regulations that prohibited wearing a yarmulke are not prohibited by the First Amendment, "even though their effect

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[8] As we will rule on Issue IV (see ___ MJ at (34-36)) that the lawfulness of the order to deploy troops as part of the U.N. mission is beyond judicial review because it is a political question, we will decline to address any aspect of appellant's argument on Issue III that implicates this issue.

is to restrict the wearing of the headgear required by his religious beliefs." *Goldman v. Weinberger*, 475 U.S. 503, 510, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986). The Court reasoned that "the desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." Id. at 509. the Court stated:

> The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity. ... The Air Force considers them as vital ... because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

Id. at 508. Based on this reasoning, we conclude that uniform requirements are considered essential to the military mission for the purpose of determining lawfulness.

Although the Goldman decision was overtaken by statute, 10 USC § 774, which now permits wearing religious apparel under certain conditions, its reasoning on uniform requirements is still sound. If uniform requirements relate to military duty, then an order to comply with a uniform requirement meets the "military duty" test set forth in paragraph 14c(2)(a)(iii).

We recently considered the issue of the "military duty" requirement in finding lawful an order given to a Marine not to drive his personal vehicle because he had been diagnosed with narcolepsy. *United States v. McDaniels*, 50 M.J. 407 (1999). Distinguishing that case from orders held to be illegal, such as not to drink alcohol or speak to other soldiers, see cases cited at 50 M.J. at 408, we held that the order in McDaniels was

within military authority because it protected other persons. In appellant's case, it is difficult to think of a requirement more necessary to promoting the basic FYROM UNPREDEP military mission or to safeguarding discipline and morale of deployed troops than uniform requirements. See *United States v. Young*, 1 M.J. 433, 435 (CMA 1976)(identification of personnel and development of esprit de corps justify military uniform requirements for hair cuts).

It is not a defense for appellant to claim that the order is illegal based on his interpretation of applicable law. An order is presumed to be lawful and the defense has the burden to prove illegality unless the order is "palpably illegal on its face." *United States v. Kapla*, 22 C.M.R. 825, 827 (AFBR 1956) quoting Winthrop's Military Law and Precedents 585-76 (2d ed. 1920 Reprint). This does not, however, allow a soldier to disobey an order because he believes it to be palpably illegal. A case remarkably similar to this one is *United States v. Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969). Private Wilson was denied conscientious-objector status and, after an unauthorized absence, wrote a statement explaining, in part, "I will refuse to wear the uniform of a soldier ever again. I am doing this out of my deeply felt convictions ... and because the Army has given me no other alternative." 19 U.S.C.M.A. at 100-101, 41 C.M.R. at 100-01. When he later refused to obey an order to wear his uniform, he was charged with willful disobedience. This Court upheld an instruction that personal scruples were not a defense. Citing *United States v. Noyd, supra*, the Court in Wilson reasoned that personal beliefs could not justify or excuse disobedience by a soldier of a lawful order.

His position is like that of the civilian whose religion or conscience is in conflict with lawful orders of the Government ... To allow scruples of personal conscience to override the

lawful command of constituted authority would "in effect ... permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167, 25 L. Ed. 244 (1879). As Noyd indicated, the freedom to think and believe does not excuse intentional conduct that violates a lawful command.

19 U.S.C.M.A. at 101, 41 C.M.R. at 101. The Court in Noyd also noted that allowing private judgment by a soldier as to which orders to obey would be "unthinkable and unworkable," and would mean that "the military need for his services must be compromised." 18 U.S.C.M.A. 491, 40 C.M.R. at 203. Appellant's arguments are essentially the same ones that were made there, and they should be rejected on the same basis.

We recently reiterated the limited nature of the grounds upon which the lawfulness of an order may be challenged in the context of denied conscientious-objector status. We determined that there was no constitutional right or statutory provision that gave an appellant "authority for a self-help remedy of disobedience." *United States v. Johnson*, 45 M.J. 88, 92 (1996), citing *United States v. Lenox*, 21 U.S.C.M.A. 314, 319, 45 C.M.R. 88, 93 (1972).

Issue IV - APPLICATION OF THE POLITICAL QUESTION DOCTRINE

The Supreme Court has long recognized the principle of "nonjusticiability": meaning that courts of law should decline to exercise their authority to decide matters where judicial intervention is deemed inappropriate. Based upon the Constitutional principle of separation of powers in the three branches of Government, judicial review of "a political question" is precluded where the Court finds one or more of the following:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 218, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962); see also *Flast v. Cohen*, 392 U.S. 83, 95, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).

The Constitution assigns specific military responsibilities to the Executive and Legislative branches of the Government. The President is Commander-in-Chief of the Armed Forces,[9] but Congress has the power to declare war and to organize, arm, and govern the military.[10]

The determination whether lawfulness of the order to deploy is a political question and thus nonjusticiable is reviewed on a de novo standard. *Padgett*, 48 M.J. at 277.

While the military judge determined that the order to wear the U.N. insignia was lawful, he properly declined to rule on the constitutionality of the President's decision to deploy the Armed Forces in FYROM as a nonjusticiable political question. Courts have consistently refused to consider the issue of the President's use of the Armed Forces. Two recent examples

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[9] U.S. Const. Art. II § 2.

[10] U.S. Const. Art. I § 8, cl. 11-14.

from the Persian Gulf War era are *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990), and *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). In the Ange case, the District Court declined to rule on the legality of deployment of troops in the Persian Gulf despite inconsistent views of *Congress and the President*. 752 F. Supp. at 512. In Huet-Vaughn, we reaffirmed the idea that personal belief that an order is unlawful cannot be a defense to a disobedience charge, holding: "The duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness." 43 M.J. at 114 (internal quotation marks omitted). The Court further upheld the military judge's decision not to consider evidence relating to the legality of the decision to deploy the Armed Forces. 43 M.J. at 115.

The basic nature of the separation-of-powers issue was also discussed in a Vietnam-era case where soldiers disobeyed an order to board a sedan for further transportation to Vietnam on the grounds that American involvement there was itself illegal. *United States v. Johnson*, 17 U.S.C.M.A. 246, 247, 38 C.M.R. 44, 45 (1967). This Court noted that the Supreme Court refused to consider challenges to the President's use of the armed forces abroad. In addition, the Court distinguished *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952), since it involved use of military power in a purely domestic dispute. The Court noted Justice Jackson's concurrence in Youngstown Sheet and Tube Co., where he stated: "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." 343 U.S. at 645.

Under these standards, we hold that this question qualifies as a nonjusticiable political question.

The decision of the United States Army Court of Criminal Appeals is affirmed.

CONCURBY:
EFFRON; SULLIVAN; EVERETT (In Part)

CONCUR:

EFFRON, Judge (concurring):

I concur in the majority opinion. I write separately to address a number of issues identified in the course of considering the present case that may bear on future litigation concerning the legality of orders.

I. Application of the Political Question Doctrine

A

According to appellant, the prosecution failed to prove that he had received a lawful order because the order was in furtherance of actions which he viewed as illegal -- the deployment of American troops to the Republic of Macedonia and the development of command and control functions and associated uniform requirements. As noted in the majority opinion, these matters were properly resolved by the military judge under the Supreme Court's political question doctrine. See *Gilligan v. Morgan*, 413 U.S. 1, 6-12, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973).

The political question doctrine serves a particularly important function in military trials by ensuring that courts-martial do not become a vehicle for altering the traditional relationship between the armed forces and the civilian policymaking branches of government. Since the days of George Washington, America has demonstrated that military professionalism is compatible with civilian control of the

armed forces. With few exceptions, American military personnel have been faithful to the concept that once their advice has been tendered and considered, they are duty-bound to implement whatever policy decisions the civilian leadership may make.

Appellant would have us change the nature of that relationship by requiring courts-martial to adjudicate the relationships between Congress and the President regarding the deployment of military forces. Consider, for example, the implications of appellant's approach in the context of the Korean conflict, where adversity in frozen fields far from home intensified a bitter national debate over the propriety of U.S. participation in an undeclared war conducted under the United Nations' auspices. Under appellant's approach, courts-martial would have been authorized to adjudicate the relationships between Congress and the President, potentially permitting members of the armed forces to disobey unpopular orders. There is nothing in the more than 2 centuries of our history as a Nation that suggests courts-martial should be empowered to rule on the propriety of deployment orders as a matter of either constitutional or military law.

B

Appellant not only insists that courts-martial should rule on the legality of deployment orders, but he also contends that the military judge should submit the issue of legality to the members as an essential element of the offense. Such an approach would be even more problematic than permitting judges to adjudicate the legality of deployments because dispositions by members would produce unreviewable decisions. See Art. 63, UCMJ, 10 USC § 863 (an acquittal is final and unreviewable). Rather than producing the unity and cohesion that is critical to military operations, appellant's approach could produce a patchwork quilt of decisions, with some courts-martial determining that orders were legal and

others determining that the same orders were illegal, without the opportunity for centralized legal review that is available for all other issues of law.

C

It is apparent that appellant has carefully considered the legality of the orders at issue and that he has formed sincere, deeply held views about the legal basis for the deployment of his unit and the related matters of command and control and uniform arrangements. Congress has provided him with a variety of means to communicate his views to his superiors and national policy makers. He may challenge policy through a complaint under Article 138, UCMJ, 10 USC § 938; he may raise his concerns to the Inspector General of the Department of Defense, 5 USC Appendix; and he may communicate directly with Members of Congress and Inspectors General without interference from his military superiors and with protections against reprisal, 10 USC § 1034. The record indicates that he has exercised his right to communicate with Members of Congress. Although Congress has acted from time to time to limit deployments, regulate command and control arrangements, and specify uniform requirements, it has not done so with respect to the issues raised by appellant. Congressional inaction does not entitle him to address such issues through disobedience and then seek the protection of a court-martial, at least to the extent that the issues of concern to him involve political questions committed to the policymaking branches of government rather than rights granted to him by the Constitution, statutes, or regulations.

D

It is important to emphasize that the political question doctrine may not be used as an excuse for avoiding issues committed by law to the court-martial process. The political question doctrine in a disobedience case arises in a context very

different from civil litigation. In the typical civil case, a party initiates litigation as a means of interjecting the courts into a dispute between the two policymaking branches of government. In a court-martial for disobedience, the Government -- not the accused -- has initiated the litigation. Reliance on the political question doctrine in such circumstances is appropriate only when the legal principles at issue are directed at the allocation of responsibilities between the two policymaking branches of the government. Where the legal principles are directed at the rights and responsibilities of servicemembers, the political question doctrine may not be used to avoid addressing the legality of orders invoking those principles, even if those questions touch upon the responsibilities of the policymaking branches. Cf. *United States v. Caceres*, 440 U.S. 741, 59 L. Ed. 2d 733, 99 S. Ct. 1465 (1979) (distinguishing between those rules designed to protect the rights of citizens and those designed to affect the management of governmental functions).

Military courts have long considered the legality of orders in cases in which an accused was directed to commit a crime or in which the purported order violated a legal standard designed to preclude commanders from abusing the fundamental rights of their subordinates or directing their subordinates to engage in criminal activities. Likewise, military courts traditionally have permitted servicemembers to defend against other charges by asserting obedience to lawful orders. Nothing in today's opinion should be viewed as permitting a military judge to avoid ruling on the legality of an order in such a case simply because the issue bears certain attributes of a political question.

II. The Tension Between Prompt Obedience and Challenges to the Lawfulness of Orders

A

The Supreme Court has emphasized that "it is the primary business of armies and navies to fight or be ready to fight wars

should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 100 L. Ed. 8, 76 S. Ct. 1 (1955). To persevere and prevail amidst the danger, death, destruction, and chaos of armed combat, military personnel must develop the disciplined habit of prompt obedience to the directives of their superiors.

Although modern military practices typically foster opportunities for discussion before a decision is made, prompt obedience is expected once an order is given. The Supreme Court has observed that "an Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *Parker v. Levy*, 417 U.S. 733, 744, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974), quoting *In re Grimley*, 137 U.S. 147, 153, 34 L. Ed. 636, 11 S. Ct. 54 (1890). "To accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986) (emphasis added).

Although the law expects prompt and instinctive implementation of orders, it does not envision unquestioning obedience. Only "lawful" orders must be obeyed. Art. 92; see RCM 916(d), Manual for Courts-Martial, United States (1998 ed.). There has always been an uneasy tension between the concept of "instinctive obedience" and the expectation that servicemembers will not obey unlawful orders. The present case has brought to light several issues growing out of that tension that may warrant further attention.

First, should the Manual for Courts-Martial provide more detailed guidance as to the appropriate means by which the legality of an order should be raised and adjudicated in a court-martial? Should it be through a motion to dismiss for failure to state an offense on the ground that the illegality deprives the

directive of its status as an "order"? Should it be recast as an affirmative defense? Should both approaches be available?

It is noteworthy that the legality of an order is treated as a defense when it is raised in the context of crimes other than disobedience offenses - for example, assault or homicide. See RCM 916(d). In one of our earliest cases, *United States v. Trani*, 1952 CMA LEXIS 826, 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952), we considered the procedure for assessing the legality of an order in a disobedience case. We observed that it is a familiar and long-standing principle of military law that the command of a superior officer is clothed with a presumption of legality, and that the burden of establishing the converse devolves upon the defense.

1 U.S.C.M.A. at 296, 3 C.M.R. at 30 (citing W. Winthrop, Military Law and Precedents 575-76 (2d ed. 1920 Reprint)). After noting that "it does not appear that the order was unlawful on its face," we commented that "it remains to be seen whether it has been shown affirmatively to be illegal." 1 U.S.C.M.A. at 297, 3 C.M.R. at 31 (emphasis added). Trani has never been overruled or distinguished. It could be viewed as consistent with either an affirmative defense approach or an approach based upon failure to state an offense.

Second, what circumstances should be encompassed by the terms "lawful," "unlawful," and "illegal" as applied to offenses involving obedience or disobedience of orders? Paragraph 415, Manual for Courts-Martial, United States, 1917, at 210, sets this high standard:

To justify from a military point of view a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted.

Subsequent editions of the Manual streamlined this language, relying instead on descriptions of various types of orders within or outside the statute. See para. 134b, Manual for Courts-Martial, U.S. Army, 1928; para. 152b, Manual for Courts-Martial, U.S. Army, 1949; para. 169b, Manual for Courts-Martial, United States, 1951; para. 169b, Manual for Courts-Martial, United States, 1969 (Revised edition); para. 14c(2)(a), Part IV, Manual, supra (1998 ed.). The current guidance, however, does not address what types of deficiencies affect the validity of an order in the context of a disobedience offense. Aside from matters involving the political question doctrine, what other questions should be excluded from or included in the concept of lawfulness as it pertains to orders?

Third, are other changes warranted as a result of the manner by which the complexity and scope of modern military operations have significantly altered the nature of military life? The 19th century model, in which military personnel were directed primarily by personal orders from an immediate superior, has been transformed by the 21st century reality into an environment governed by thousands of pages of directives, regulations, standard operating procedures, and policy manuals issued by a variety of military and civilian authorities at service, joint, and international command levels. Under what circumstances should a servicemember be permitted to rely on one of these issuances to disobey a direct command from a superior?

It is well established that a servicemember may defend against a disobedience charge by demonstrating that compliance with the order would constitute a crime or would violate a standard of law intended to protect significant rights of the servicemember or a third party. Should an order be treated as not "lawful" if it is inconsistent with another issuance, even if that issuance addresses only routine administrative matters? If not, under what circumstances

should a servicemember who alleges reasonable reliance on the administrative issuance be permitted to raise a defense of mistake of fact or mistake of law?

Fourth, how should the burden of demonstrating the legality or illegality of an order be allocated? Do the references in the Manual and case law to a "presumption" or "inference" of legality suggest that the production of any information to the contrary negates the presumption and places the burden on the prosecution to prove the legality of the order? Alternatively, in the context of an issue of law, should the presumption or inference simply mean that the issue of legality does not arise until raised by some information presented to the military judge in an appropriate motion and that, once presented, the military judge considers the issue de novo like many other issues of law?

Fifth, should the relative responsibilities of the military judge and the members of the court-martial panel be revisited? As noted above, the present Manual (2000 ed.) provides some guidance in paragraph 14c(2)(a), Part IV, on which types of orders may be considered lawful or unlawful, but provides no guidance on the allocation of duties within the court-martial itself.

RCM 801(e), governing the power of the military judge to rule finally on interlocutory questions and questions of law, provides the following general guidance: first, any ruling on a question of law or interlocutory question is final--RCM 801(e)(1)(A); and second, the military judge decides questions of fact within an interlocutory question under a preponderance-of-the-evidence standard--RCM 801(e)(4). The text of the rule does not address the legality of orders. The non-binding Discussion accompanying RCM 801(e)(5) briefly notes that "the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged ... normally [is a] question[] of law." In short, the

Rule is silent and the Discussion contemplates no role for the court members. Regardless whether it is an issue of law or an issue of fact, the Discussion contemplates that the matter will be resolved by the military judge.

The Military Judges' Benchbook, however, takes a different approach. The non-binding model instructions for Article 92 offenses provide:

When it is clear as a matter of law that the order was lawful, this should be resolved as an interlocutory question ....
***
If there is a factual dispute as to whether or not the order was lawful, that dispute must be resolved by the members in connection with their determination of guilt or innocence. ...
***
If the military judge determines, as a matter of law, that the order was not lawful, [the judge] should dismiss the affected specification ....

Para. 3-29, Military Judges' Benchbook at 3-59 (Dept. of the Army Pamphlet 27-9 (Oct. 1986)). This guidance appears to be inconsistent with RCM 801(e). If the question of lawfulness should continue to be treated as an interlocutory question or a question of law, then under RCM 801(e), it is the responsibility of the military judge -- not the members -- to decide questions of law and any questions of fact arising thereunder.

The Benchbook, however, clearly reflects a degree of discomfort with the removal of any role for the members in such a case beyond determining whether the order was, in fact, issued and received. Although there have been lower court opinions rejecting defense challenges to the adequacy of instructions following the Benchbook approach, e.g., *United States v. Tiggs*, 40 C.M.R. 352 (ABR 1968), pet. denied, 18 U.S.C.M.A. 630, 39 C.M.R. 293 (1969), it does not appear that

any cases have addressed the relationship between the Manual and the Benchbook in terms of the roles of the members and the military judge.

In contrast to the Manual's focus on the military judge as the decision maker on the issue of legality in disobedience cases, the Manual contemplates a role, albeit somewhat limited, for the members in considering the legality of an order when raised as a defense to another crime. RCM 916(d), which governs the defense of obedience to orders, provides:

It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

The prosecution has "the burden of proving beyond a reasonable doubt that the defense" of obedience to orders "did not exist." RCM 916(b). The military judge decides as a matter of law whether the order raised by the defense was lawful. If so, the defense of justification applies and the charge is dismissed. See RCM 916(c). If the military judge rules that the order was unlawful, the judge so instructs the members and the members then decide whether the prosecution has proved beyond a reasonable doubt that the accused actually knew that the order was unlawful or that a person of ordinary sense would have known that the order was unlawful. See *United States v. Calley*, 22 U.S.C.M.A. 534, 541-42, 48 C.M.R. 19, 26-27 (1973).

In view of the role given to the members in assessing the reasonableness of a servicemember's interpretation of the legality of an order when raised as a defense, should they be given a similar role under the Manual in assessing legality in a disobedience case? If so, what role should they be given? Should the guidance in the Benchbook be given stature in the Manual? If so, how should it be reconciled with RCM 801(b),

under which the factual components of an interlocutory issue are resolved by the military judge, not the members?

Underlying these concerns is the question of which issues involving the legality of an order call for the expertise that a blue ribbon court-martial panel brings to the process and which call for the expertise that a military judge brings to the process. As our men and women in uniform are increasingly deployed to serve as peacekeepers and peace enforcers in challenging circumstances in which traditional rules of engagement are difficult to employ, it is quite possible that these questions will arise in a real, rather than theoretical, situation. It is an area in which a fresh review and possible modification of the guidance in the Manual could be most helpful. To the extent that this guidance would involve procedural matters, the President has the authority to establish authoritative rules in the Manual under Article 36, UCMJ, 10 USC § 836. To the extent that such guidance would involve interpretation of substantive offenses, it would be binding to the extent that it provided rights greater than those available under the statute. In any case, such guidance would be given considerable deference.

Although the temptation often is great -- with good justification -- to allow the law to develop through the process of litigating specific cases, this is an area in which many weighty questions affecting the fundamental rights and obligations of servicemembers remain unanswered. In that context, a serious effort to address the questions concerning the process of adjudicating the legality of orders would appear to be in the best interest of our Nation and our men and women in uniform.

SULLIVAN, Judge (concurring in the result):

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I

Overview

Thousands of military orders are given each day in our armed forces as they have been given throughout the history of our great country. Article 92(2), Uniform Code of Military Justice, 10 USC § 892, legislatively reflects the traditional Anglo-American view that only the disobedience of "lawful" orders is prohibited. See, e.g., Articles 90(2), 91(2), and 92(1), UCMJ, 10 USC §§ 890(2), 891(2), and 892(1), respectively. Today, the majority characterizes the lawfulness of an order as mere "surplusage" and judicially eliminates it as an essential element of a disobedience offense. ___ MJ at (23 and n.7). I strongly disagree with this radical departure from our political, legal, and military tradition. See *Unger v. Ziemniak*, 27 M.J. 349, 358 (CMA 1989).

The instant case is ultimately about the process due an American servicemember on trial for the crime of disobedience of a lawful order, i.e., how the lawfulness of the disobeyed order is to be determined at a court-martial and whether that procedure is constitutional. See generally *Weiss v. United States*, 510 U.S. 163, 176-81, 127 L. Ed. 2d 1, 114 S. Ct. 752 (1994). Today, the majority opinion holds that the lawfulness of an order was properly decided as "a question of law" by the military judge in this case and cites Article 51(b), UCMJ, 10 USC § 851(b). I view the lawfulness of an order in a disobedience case as an element of that offense which in appellant's case presented a justiciable mixed question of fact and law that the members of his court-martial should have decided. See Article 51(c) and *United States v. Gaudin*, 515 U.S. 506, 522-23, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) (elements of a criminal offense which are mixed questions of fact and law must be determined by the jury members).

Finally, modern military legal practice has long provided a procedure for determining the lawfulness of an order in disobedience cases. See para. 3-16-3 n.3, Military Judges' Benchbook (Department of the Army Pamphlet 27-9 (01 April 2001) and (30 Sept. 1996)); see also paras. 3-14-2 n.4; 3-15-2 n.3; 3-16-1, n.3; and 3-16-2 n.4, Benchbook, supra (1996 & 2001 eds.). It is well established that the military judge determines the lawfulness of an order and so instructs the members if no question of fact is raised pertaining to this question. See *Unger v. Ziemniak*, supra at 359. However, if there are questions of fact raised pertaining to the lawfulness of the order violated, the members of the court-martial are required to determine lawfulness as a mixed question of fact and law. Id. See *United States v. Robinson*, 6 U.S.C.M.A. 347, 356, 20 C.M.R. 63, 72 (1955); *United States v. Zachery*, 6 C.M.R. 833, 837 (AFBR 1952) (factual questions concerning legality of order to be decided by members). Today, the

majority disregards this long-existing military practice and broadly creates a new rule that the military judge finally decides the lawfulness of an order in all cases prosecuted under Article 92. But see *United States v. Ornelas*, 1952 CMA LEXIS 461, 2 U.S.C.M.A. 96, 99-101, 6 C.M.R. 96, 99-101 (1952) and Article 39(a)(1) and (2), UCMJ, 10 USC § 839(a)(1) & (2); see generally C. Wright, Federal Practice and Procedure: Criminal 3d § 194 at 366-67 (1999) (pretrial motion raising defenses and objections which implicate trial of general issue should only be decided by jury). I must disagree with this additional departure from established military practice and its application to appellant's case where I conclude questions of fact were raised concerning the lawfulness of the order violated. See generally *United States v. Scheffer*, 523 U.S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998); see also *United States v. Tualla*, 52 M.J. 228, 231 (2000) ("adhering to precedent is usually the wise policy" (internal quotation marks omitted)).

The majority's unsettling approach to all these questions is completely unnecessary to resolve appellant's case. As explained below, appellant had a single justiciable legal claim against his commander's order which was based on a service uniform regulation. The evidence in this case, however, overwhelmingly established that this order did not violate that Army uniform regulation and was otherwise lawful. See *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999); see also *Johnson v. United States*, 520 U.S. 461, 470, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997).

II

The Political-Question Doctrine Resolves All of Appellant's Claims But One

My separate opinion in this case is expressly limited to the single claim of appellant that the disobeyed order was unlawful

because it violated a U.S. Army Uniform Regulation under the facts of his case. This particular claim is the only claim that raised a contested question of fact. Appellant made other legal claims that the order to wear certain United Nations (UN) accoutrements on his United States Army uniform was unlawful. In these other claims, he particularly argued that the order was unlawful based on the constitutional prohibition against involuntary servitude (Amend. XIII), the UN Participation Act, and his enlistment contract. (R. 423) These arguments involved no real factual disputes and pertained to the legality of his deployment order to Macedonia as part of the UN Peacekeeping Force. See also *United States v. Lenox*, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).

It is my view that these particular legal claims (challenges to deployment) are not justiciable issues at a court-martial in a trial for disobedience of orders. See *United States v. Johnson*, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967). In this regard, I agree with Judge Effron and Senior Judge Everett that these legal arguments were properly rejected by the military judge. The disposition of these claims under the political-question doctrine was a pure question of law for the military judge alone (see *United States v. Austin*, 27 M.J. 227, 230, 234 (CMA 1988); *United States v. Phillips*, 18 U.S.C.M.A. 230, 234, 39 C.M.R. 230, 234 (1969)) and did not legally violate appellant's right to a decision by the factfinders on all the elements of a crime. See *United States v. Brown*, 50 M.J. 262, 265 (1999); see also *United States v. Bridges*, 12 U.S.C.M.A. 96, 99-100, 30 C.M.R. 96, 99-100 (1961) (decision on what law to apply to determine whether element of crime established is solely question of law for president of court-martial). See generally Article 51(b), UCMJ, 10 USC § 851(b) (1968) (adding "questions of law" authorization for military judge).

The political-question doctrine, however, cannot be used to resolve appellant's additional claim that the order in question

violated the U.S. Army Uniform Regulation. This claim did not require a ruling on the legality of the deployment and raised justiciable questions of fact pertaining to an element of the offense that needed to go to the military jury for resolution. See *United States v. Robinson*, supra 6 U.S.C.M.A. at 353-56, 20 C.M.R. at 69-72. See generally Article 51(c) and *United States v. Gaudin*, supra. On this point I join the wise and thoughtful opinion of Senior Judge (former Chief Judge) Everett. His resolution of this particular issue is consistent with my view of this issue.

III

General View of the Case

This is the case of Specialist Michael New, an American soldier in Germany, who was ordered by his U.S. Army superiors to put on a United Nations blue beret and UN insignia on his uniform when his unit was alerted for deployment to Macedonia.[1] He refused this order and was ordered to stand trial for that disobedience at a court-martial. Specialist New

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[1] Although this case involves a uniform order, the case is far from being simple. Justice Oliver Wendell Holmes, Jr., once said:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Company v. United States, 193 U.S. 197, 400-01, 48 L. Ed. 679, 24 S. Ct. 436 (1904) (Holmes, J., dissenting). The present case may be a great case, but we must be mindful not to bend the cherished principle that properly contested elements of a crime are to be decided by the jury whether it is a civilian or a military jury.

chose a trial by a court-martial panel of members [hereinafter called a "military jury"].[2]

At the court-martial of Specialist New, in order to successfully prosecute him, the Government basically needed to prove three facts:

1. that Specialist New received and understood the order to put on the UN Beret and UN insignia;

2. that the order was lawful; and

3. that Specialist New disobeyed the order.

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[2] A military accused does not have a right to a trial by jury of his peers as provided in the Sixth Amendment. He does have a right to a trial by his military superiors (see Article 25(d)(1), UCMJ, 10 USC § 825(d)(1)) who are selected by the convening authority (see Article 25(d)(2)). I have suggested that the Uniform Code of Military Justice be amended to provide for random selection of members. See *United States v. Roland*, 50 M.J. 66, 70 (1999) (Sullivan, J., concurring in the result).

Nevertheless, court-martial panel members in a functional sense are commonly referred to as a military jury. See F. Gilligan and F. Lederer, 2 Court-Martial Procedure § 15-11.00 at 3-4 (1999) ("As a consequence, as long as a military judge is present, court members are merely military jurors lacking any powers that would be considered unique in the civilian world." (Footnote omitted; emphasis added); D. Schlueter, Military Criminal Justice: Practice and Procedure § 15-2(e) at 635 (5th ed. 1999) ("The court members comprise the military's counterpart of the civilian jury."); H. Moyer, Justice and the Military § 2-602 at 529 (1972) ("As with civilian juries, military court members vote on the findings of guilty or innocence."). This Court has also held that certain due process requirements pertaining to civilian juries are applicable to military courts of members even though the military accused has no Sixth Amendment right to trial by jury. See *United States v. Witham*, 47 M.J. 297, 300-03 (1997); *United States v. Tulloch*, 47 M.J. 283, 285 (1997).

At trial Specialist New did not dispute that the order was given, that he understood it or that he disobeyed it. However he made clear that his intended defense at trial was that the order was unlawful for several different reasons. Thus, his guilt or innocence at trial was to turn largely on the determination by the "military jury" whether the order he disobeyed was lawful or unlawful. As shall be discussed in detail below, his judge instructed the "military jury" before they deliberated that the order was lawful. Thus, the issue of Specialist New's guilt was, in effect, determined by the judge in his instructions, rather than by the "military jury" in its deliberations. In my view, this was an error under established military procedure and as a matter of constitutional due process.

IV

General View of the Law

As a cadet at West Point[3] and as a soldier, I was taught that (i) all lawful orders in the U.S. Army were to be obeyed; and (ii) however, if you believed that an order was unlawful, you could disobey it but you would risk a court-martial where a "military jury" would either validate or reject your decision to disobey. See J. Snedeker, Military Justice under the Uniform Code 593, 599 (1953); W. Winthrop, Military Law and Precedents 575-76 (2d ed. 1920 Reprint); W. De Hart,

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[3] Every cadet takes the following oath when he enters the United States Military Academy at West Point, New York:

I, (full name), do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State or country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the Uniform Code of Military Justice." 10 USC § 4346 (emphasis added).

Observations on Military Law and the Constitution and Practice of Courts-Martial, 165-66 (1846).

Colonel Winthrop stated the following regarding a soldier's decision to disobey an order he thought was unlawful:

"**Lawful command**." The word "lawful" is indeed surplusage, and would have been implied from the word "command" alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command not lawful may be disobeyed, no matter from what source it proceeds. But to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful. The order must be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land. The unlawfulness of the command must be a fact, and, in view of the general presumption of law in favor of the authority of military orders emanating from official superiors, the onus of establishing this fact will, in all cases-except where the order is palpably illegal upon its face-devolve upon the defence, and clear and convincing evidence will be required to rebut the presumption.

The legality of the order may depend upon the period, whether one of peace or war, (or other emergency,) at which it is issued. An order which would be unlawful in peace or in the absence of any public exigency, may be perfectly lawful in war as being justified by the usages of civilized warfare. Thus an order for the seizure of citizens' property for the subsistence or transportation of the troops, the construction of defences, &c., or for its destruction to facilitate the operations of the army in the field, or to prevent its falling into the hands of the enemy, would be not only authorized, but to disobey it would be a grave military crime. But, in general, in time of peace an order similarly in disregard or private right would be repugnant to the

first principles of law, and to fail to obey it would constitute no violation of the present Article.

But while a military inferior may be justified in not obeying an order as being unlawful, he will always assume to do so on his own personal responsibility and at his own risk. Even where there may seem to be ample warrant for his act, he will, in justifying, commonly be at a very considerable disadvantage, the presumption being, as a rule, in favor of the legality of the order as an executive mandate, and the facts of the case and reasons for the action being often unknown in part at least to himself and in the possession only of the superior. In the great majority of cases therefore it is found both safer and wiser for the inferior, instead of resisting an apparently arbitrary authority, to accept the alternative or obeying even to his own detriment, thus also placing himself in the most favorable position for obtaining redress in the future. On other hand, should injury to a third person, or damage to the United States, result from the execution of an order by a subordinate, the plea that he acted simply in obedience tot he mandate of his proper superior will be favored at military law, and a court-martial will almost invariably justify and protect an accused who has been exposed to prosecution by reason of his unquestioning fidelity to duty, holding the superior alone responsible. How far he will be protected by the civil tribunals, if sued or prosecuted on account of a cause of action or offence involved in his proceeding, will be considered [elsewhere].

Winthrop, supra at 575-76 (most emphasis added; footnotes omitted).

It is also my view today that a military accused has a codal and constitutional right to have the members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense of which he is charged. See Article

51(c), UCMJ, 10 USC § 851(c), and *United States v. Glover*, 50 M.J. 476 (1999); *United States v. Brown*, 50 M.J. at 265; *United States v. Mance*, 26 M.J. 244, 254 (CMA 1988) (duty of military judge to instruct members on all elements of the offense). See also *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310; see generally *Weiss v. United States*, 510 U.S. at 177-78 (recognizing Fifth Amendment due process standard for measuring court-martial procedures).

V

Appellant's Trial

Appellant was charged and found guilty of failure to obey a lawful order in violation of Article 92(2), UCMJ. The specification he was found guilty of states:

SPECIFICATION: In that Specialist Michael G. New, US Army, having knowledge of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same.

(Emphasis added.)

In a pretrial session under Article 39(a), UCMJ, 10 USC § 839(a), the military judge addressed a series of government and defense motions, including motions to dismiss which he denied. Then, the judge held as a matter of law that the uniform order given to appellant was lawful and that the members of the jury would be so instructed with regard to their deliberations on his guilt of disobeying that order. (R. 285, 376) Defense counsel strongly objected to both these rulings. (R. 423-433, 448-49)

Appellant had raised several claims that the order to attach UN accoutrements (i.e., patches and cap) to his U.S. Army uniform was unlawful. As noted earlier, these arguments pertain to the legality of appellant's deployment and are not justiciable issues under our case law. See *United States v. Johnson*, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967). I agree with Judge Effron and Senior Judge Everett that appellant's claims that the order was illegal on these bases were properly rejected by the judge as a matter of law ("political-question doctrine"). See United States v. Johnson, supra.

A remaining argument, however, that the defense asserted at trial was that the order in question, i.e., to wear the UN patches and cap, violated a Department of the Army Regulation, i.e., Army Regulation (AR) 670-1, Wear and Appearance of Army Uniforms and Insignia (1 September 1992). It pointed to paragraph 3-4, which stated:

Insignia and accouterments authorized for wear with these uniforms are *** (k) Foreign badges, distinctive unit insignia, and regiment distinctive insignia will not be worn on these uniforms.

(Emphasis added.)

Both the military judge and the Court of Criminal Appeals found that this regulation did not invalidate the disobeyed order in this case because paragraphs 1-18 and 2-6d of the same regulation permitted these uniform additions.

Paragraph 1-18 provides:

Wearing of organizational protective or reflective clothing.

Commanders may require the wear of organizational protective or reflective items or other occupational health or safety

equipment with the uniform when safety considerations make it appropriate. These items will be furnished at no cost to the individual.

(Emphasis added.)

Paragraph 2-6d provides:

The commander in charge of units of maneuver may prescribe the uniform to be worn within the maneuver area.

(Emphasis added.)

Both the judge at trial and the Court of Criminal Appeals found as fact that the disobeyed order was issued for "safety" purposes and while on "maneuver." (R. 426, 428) (R. 443-44 & 449)

The military judge then made a ruling that the order given to appellant was a lawful order. See R. 431. Later, prior to trial counsel's and defense counsel's arguments on findings, the military judge gave the members the following instructions on findings:

In order to find the accused guilty of this [disobedience] offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements: One, that a member of the armed forces, namely, Lieutenant Colonel Stephen R. Layfield, on 2 October 1995; and Captain Roger H. Palmateer, on 4 October 1995, issued a certain lawful order to wear the prescribed uniform for the deployment to Macedonia, i.e., UN patches and cap;
***

Members of the court, as a matter of law, the order in this case, as described in the specification--if, in fact, there was such an order--was a lawful order.

***

You should consider, along with all the evidence in this case, the following: I previously instructed you that, as a matter of law, the order in this case, as described in the specification--if, in fact, there was such an order--was a lawful order. I further instruct you at this time that, as a matter of law, the accused would not have violated AR 670-1 by obeying the order in this case as described in the specification, if, in fact, there was such an order.

(R. 782-84 (emphasis added)).

After the arguments on findings, the military judge again instructed the members on the findings in the following manner:

I have judicially noticed that AR 670-1 is a lawful regulation [and] that the accused had a duty to obey that regulation.

***

You should consider, along with all the evidence in this case, the following:

I previously instructed you that, as a matter of law, the order in this case, as described in the specification--if, in fact, there was such an order--was a lawful order. I further instruct you at this time that, as a matter of law, the accused would not have violated AR 670-1 by obeying the order in this case, as described in the specification, if, in fact, there was such an order.

(R. 829-30 (emphasis added)).

VI

Lawfulness Of Order As Element Of The Offense

The first question I will particularly address is whether the lawfulness of the order allegedly violated in this case is an element of the offense of disobedience of an order under Article 92(2), UCMJ. This criminal statute states:

§ 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter who--

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

(Emphasis added.)

I conclude for several reasons that the lawfulness of the order allegedly violated in this case (the order to wear UN patches and cap) was an element of the charged offense and, accordingly, under Article 51(c), UCMJ, and *United States v. Gaudin*, 515 U.S. at 522-23, should have been presented to the "military jury."[4]

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[4] The majority's citations to *Cox v. United States*, 332 U.S. 442, 453, 92 L. Ed. 59, 68 S. Ct. 115 (1947), and *Yakus v. United States*, 321 U.S. 414, 88 L. Ed. 834, 64 S. Ct. 660 (1944), do not support its contrary position in this case. In Cox, the legality of the classification which was alleged to have violated the applicable regulation was not an element of the charged

First, I note that Article 92, UCMJ, as well as other codal provisions noted above, expressly prohibit failure to obey a "lawful" order, language recognizing the historical and political importance of requiring servicemembers to obey only lawful orders. See G. Davis, A Treatise on the Military Law of the United States 378-82 (1913 3d ed. rev.); C. Clode, The Administration of Justice Under Military and Martial Law 30-31 (2nd ed. 1874); Winthrop, Military Law and Precedents 575 (2nd ed. 1920 Reprint). See generally *United States v. Gentle*, 16 U.S.C.M.A. 437, 441, 37 C.M.R. 57, 61 (1966); *United States v. Milldebrandt*, 8 U.S.C.M.A. 635, 639, 25 C.M.R. 139, 143 (1958) (Quinn, C.J., concurring in the result) (American servicemembers "are neither puppets nor robots").

Second, I note that the President in the Manual for Courts-Martial, United States, has repeatedly identified the lawfulness of the order as an element of this offense.[5] See paras. 16b(2)(a) and 16c(1)(c), Part IV, Manual for Courts-Martial, United

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criminal offense. In Yakus, Congress expressly provided that a person could be prosecuted for violating certain regulations or regulatory decisions without regard to the validity of such a regulation unless the accused previously challenged them in an appropriate civil proceeding or exhausted his administrative remedies. Cf. Article 96, UCMJ, 10 USC § 896 (prohibiting releasing prisoner without authority "whether or not the prisoner was committed in strict compliance with law.").

[5] This was a change from previous Army Manuals which did not expressly describe lawfulness as an element of the offense of disobedience of orders but simply noted commands can be presumed lawful in its explanation of the elements of this offense. Paras. 152b and 153b, Manual for Courts-Martial, U.S. Army, 1949; paras. 134b and 135b, Manual for Courts-Martial, U.S. Army, 1928; paras. 415 and 416, Manual for Courts-Martial, U.S. Army, 1917. See *United States v. Trani*, 1952 CMA LEXIS 826, 1 U.S.C.M.A. 293, 295, 3 C.M.R. 27, 29 (1952) (discussing Article of War (AW) 64 and paragraph 152b, Manual for Courts-Martial, U.S. Army, 1949.

States (1995 ed.) ("That a member of the armed forces issued a certain lawful order"). See also para. 16(b)(2)(a), Manual, supra (1994 ed.); para. 16a(1) and c(1)(C), Manual, supra (1984 ed.); para. 171b, Manual for Courts-Martial, United States, 1969 (Revised Edition); para. 171b, Manual for Courts-Martial, United States, 1951.

Third, this Court, in an opinion authored by then-Chief Judge Everett, unanimously stated that "in a prosecution for disobedience, lawfulness of the command is an element of the offense." *Unger v. Ziemniak*, 27 M.J. 349, 358 (1989). See Articles 90(2), 91(2), and 92(1) and (2), UCMJ; *United States v. Martin*, 1952 CMA LEXIS 591, 1 U.S.C.M.A. 674, 676, 5 C.M.R. 102, 104 (1952); *United States v. Young*, 1 M.J. 433, 437 (CMA 1976). See *United States v. Trani*, 1952 CMA LEXIS 826, 1 U.S.C.M.A. 293, 295, 3 C.M.R. 27, 29 (1952); see also *United States v. Hill*, 5 C.M.R. 665, 669 (AFBR 1953) (presumption of lawfulness in Manual is "tantamount to saying that the lawfulness of the regulation was an element of the offense").

Fourth, military law commentators over many years have consistently stated that lawfulness of an order in disobedience case is an essential element of this offense or those related thereto. See J. Snedeker, Military Justice under the Uniform Code §§ 2902-03 at 593-94, 597-99; Davis, supra at 380-81; cf. Winthrop, supra at 575-76 (suggesting it may be a statutory defense).

Finally, the majority opinion asserts that the lawfulness language in Article 92(2) is mere "surplusage" and that the word "lawful" simply reinforces the nature of the order without

establishing a separate and distinct element of the offense.[6] ___ MJ at (23) and n.7. For this proposition it cites Winthrop, supra at 575, who there states:

> The word "lawful" [in AW 21] is indeed surplusage, and would have been implied from the word "command" alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command not lawful may be disobeyed, no matter from what source it proceeds.

(Most emphasis added (footnote omitted.))

This quote from the "Blackstone of Military Law" (see *Reid v. Covert*, 354 U.S. 1, 19 n.38, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) (plurality opinion)) provides relevant background for interpreting Article 92(2) and determining its essential elements. See *Staples v. United States*, 511 U.S. 600, 619, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994). Winthrop clearly recognized that if the statutory word "lawful" is used in the disobedience context, it has meaning in terms of the type of military order whose disobedience is punishable at a court-martial. It also shows that Congress could have enacted a statute prohibiting disobedience of orders without regard for the order's lawfulness but chose not to do so. See Article 97, UCMJ, 10 USC § 897 ("except as provided by law"); cf. Article 95, UCMJ, 10 USC § 895 (arrest, custody, confinement); Article 96 ("whether or not the prisoner was committed in strict compliance with law"). Finally, his quotation clearly reflects the traditional Anglo-American view that a servicemember may not be punished at a court-martial

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[6] The majority cannot have it both ways. If the lawfulness of an order is surplusage and implied in the element of an order, the members would still be required to decide lawfulness as part of their findings on the order element of the offense. See para. 16b(2)(a), Part IV, Manual, supra (1995 ed.).

for disobeying all orders of whatever mature issued by a competent superior authority. In these circumstances, I disagree with my fellow Judges that Congress did not intend the lawfulness of the order violated to be an essential element of this criminal offense. See *Unger v. Ziemniak*, supra at 358.

VII

Lawfulness of Order is Not an Interlocutory Question or Question Of Law

The Court of Criminal Appeals held that the question whether a disobeyed order was lawful in this disobedience prosecution was "an interlocutory question." 50 M.J. 729, 738 (1999). An interlocutory question, however, is generally understood to be one that "does not bear on the ultimate merits of the case." See *United States v. Ornelas*, 2 U.S.C.M.A. at 100, 6 C.M.R. at 100. Moreover, we have expressly held that a question is not interlocutory where it is "concerned with disputed questions of fact regarding a matter which would bar or be a complete defense to the prosecution." *United States v. Berry*, 6 U.S.C.M.A. 609, 613, 20 C.M.R. 325, 329 (1956). Since a servicemember may not legally be found guilty of violating an unlawful order (see Winthrop, supra, and *Unger v. Ziemniak*, supra) and questions of fact were raised in this case concerning the lawfulness of the order, it cannot logically or legally be considered an interlocutory question within the meaning of Article 51(b).

The majority of this Court further contends the lawfulness of an order is a "question of law" which must be decided by the military judge. See *United States v. Carson*, 15 U.S.C.M.A. 407, 408, 35 C.M.R. 379, 380 (1965).[7] We have generally held

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[7] Para. 57b, Manual for Courts-Martial, United States, 1969 (Revised Edition) (no longer in effect) did say, based on Carson, that the lawfulness of orders is "customarily" a question of law.

that a question of law is one where no facts are at issue and only a "legal effect" need be determined. *United States v. Ware*, 1 M.J. 282, 284 n.4 (1976); *United States v. Bielecki*, 21 U.S.C.M.A. 450, 454, 45 C.M.R. 224, 228 (1972); see *United States v. Boehm*, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968). None of those cases, however, approved judicial determinations on elements of an offense, nor has the dicta of this Court in Carson ever been reconciled with the decision of the Supreme Court in *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310. Cf. *Dennis v. United States*, 341 U.S. 494, 511-15, 95 L. Ed. 1137, 71 S. Ct. 857 (1951) (plurality opinion) (holding that pretrial motion challenging constitutionality of criminal statute on First Amendment grounds was question of law for judge); *United States v. Viefhaus*, 168 F.3d 392, 396-97 (10th Cir.) (distinguishing Dennis, as not involving element of offense), cert. denied, 527 U.S. 1040, 144 L. Ed. 2d 801, 119 S. Ct. 2402 (1999). Moreover, there are facts at issue in this case which had to be resolved before the lawfulness of the order under the uniform regulation could be decided. See *United States v. Robinson*, 6 U.S.C.M.A. at 355, 20 C.M.R. at 71.

The majority's position that the lawfulness of an order in a disobedience prosecution is "a question of law," not to be decided by the members, is based on language in this Court's opinion in *United States v. Carson*, supra 15 U.S.C.M.A. at 408, 35 C.M.R. at 380. The majority concedes this statement in Carson was dicta. ___ MJ at (13). Moreover, it recognizes that the dicta in Carson is inconsistent with subsequent pronouncements of this Court in *Unger v. Ziemniak*, 27 M.J. 349. In addition, I note the Supreme Court in Gaudin expressly rejected the notion that members of a jury were incompetent to decide mixed questions of law and fact, the lynchpin of the Carson dicta noted above. See *United States v. Gaudin*, supra 515 U.S. at 521; cf. *United States v. Carson*, supra 15

U.S.C.M.A. at 408-09, 35 C.M.R. at 380-81. Accordingly, Carson is not persuasive authority for holding that the lawfulness of an order in a disobedience prosecution is a question of law for the military judge.

There is another reason why I disagree with the majority's holding that lawfulness of an order in a disobedience prosecution is a question of law for the military judge under Article 51(b). Article 51(b) does not delineate what a "question of law" is for purposes of final decision by a military judge. Other provisions of the Uniform Code of Military Justice, however, do indicate Congress' intent in this regard. In Article 51(c), Congress clearly recognized that members of a court-martial must decide whether the elements of an offense are proved by the Government beyond a reasonable doubt. Moreover, in Article 39(a)(1) and (2), UCMJ, 10 USC § 839(a)(1) & (2), Congress implicitly recognized that "motions raising defenses or objections which are [not] capable of determination without trial of the issues raised by a plea of not guilty" are a "matter ... appropriate for later consideration or decision by the members of the court."

In this codal context, it is clear that a "question of law" for purposes of Article 51(b) does not include elements of an offense which raise mixed questions of fact and law (e.g., *United States v. Gaudin, supra)* or pretrial motions which raise questions of fact "intermeshed with questions on the merits of a case" (*United States v. Medina*, 90 F.3d 459, 463-64 (11th Cir. 1996); see *United States v. Grimmett*, 150 F.3d 958, 962 (8th Cir. 1998)). To the extent that dicta in Carson suggests the contrary, it should be ignored. Accordingly, whether lawfulness of an order is an element of an offense or simply "an important issue" or an indiscrete element of the offense as suggested by the majority, it was not "a question of law" to be finally ruled on by the military judge under Article 51(b). See also *United States v. Wallace*, 2 U.S.C.M.A. 595, 598-99, 10 C.M.R. 93,

96-97 (1953)(similarly sending to jury question of knowledge of order under Article 90(2)).

In my view, Article 51(c) requires the military judge to instruct the members on the law pertaining to the elements of a charged offense. See *United States v. Brown*, 50 M.J. at 265. The content of these instructions are questions of law for the military judge. *United States v. Bridges*, 12 U.S.C.M.A. at 99-100, 30 C.M.R. at 99-100; see generally Article 51(b), UCMJ, and 114 Cong. Rec. 29401 (1968). The ultimate decision, however, on an element of the crime which is a mixed question of fact and law is a matter for the members' determination under Article 51(c), and Gaudin.

VIII

***Error Under United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995)**

Having concluded that the lawfulness of the order violated is an element of the offense of disobedience of orders under Article 92(2), it is necessary to determine whether the military judge erred in withdrawing that question from the members' consideration. The Supreme Court in Gaudin addressed a similar question where a federal district court judge refused to submit to the jury the question of the materiality of a fact contained in a false statement allegedly made in violation of 10 USC § 1001. 515 U.S. at 507. The question before the Supreme Court was whether the accused "was entitled to have this element of the crime determined by the jury." 515 U.S. at 509.

In Gaudin, a case remarkably similar in concept to the instant case, a real estate broker was charged with making several false material statements on different federal loan documents in violation of 18 USC § 1001. Two counts charged him with "knowingly inflating the appraised value of the mortgaged property" and one count with falsely stating that the buyer paid some closing costs. The prosecution offered

testimony of several government officials "who explained why the requested information" on the form "was important." The Supreme Court noted what happened next:

> At the close of the evidence, the United States District Court for the District of Montana instructed the jury that, to convict respondent, the Government was required to prove, inter alia, that the alleged false statements were material to the activities and decisions of HUD. But, the court further instructed, "the issue of materiality ... is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements." App. 24, 29. The jury convicted respondent of the § 1001 charges.

515 U.S. at 508-09 (emphasis added). The Ninth Circuit, sitting in panel and later en banc, reversed because case law required that the issue of materiality in a § 1001 prosecution be decided by the jury. The Supreme Court affirmed the Ninth Circuit by 9-0 vote.

The Supreme Court in Gaudin recognized the basic constitutional right of a criminal defendant "to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." 515 U.S. at 522-23 (emphasis added). It traced this right directly to the Fifth Amendment of the United States Constitution. It said:

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt

Sullivan v. Louisiana, 508 U.S. 275, 277-278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993). The right to have a jury make the ultimate determination of guilty has an impressive pedigree. Blackstone described "trial by jury" as requiring that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendants] equals and neighbors ...." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added). Justice Story wrote that the "trial by jury" guaranteed by the Constitution was "generally understood to mean ... a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had." 2 J. Story, Commentaries on the Constitution of the United States 541, n.2(4th ed. 1873) (emphasis added and deleted). This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." Id., at 540-41. See also *Duncan v. Louisiana*, 391 U.S. 145, 151-154, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) (tracing the history of trial by jury).

515 U.S. at 509-11 (most emphasis added; footnotes omitted).

In *Gaudin, supra,* the Supreme Court ruled against the Government's argument that "materiality" was a legal question, not a factual question, and therefore, should be decided by the trial judge alone. The majority today, however, with a familiar echo to the losing government position in Gaudin, holds that the lawfulness of an order is a "question of law" for the judge alone under Article 51(b), UCMJ.[8]

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[8] The majority's position in this case also cannot be squared with numerous decisions of this Court after Carson which hold that the question of an accused's military status (in personam jurisdiction) must also be

The Supreme Court, however, rejected this type of thinking in Gaudin when it said:

Other reasoning in *Sinclair*, [279 U.S. 263 (1929),] not yet repudiated, we repudiate now. It said that the question of pertinency "may be likened to those concerning relevancy at the trial of issues in court," which "is uniformly held [to be] a question of law" for the court. 279 U.S. at 298. But how relevancy is treated for purposes of determining the admissibility of evidence says nothing about how relevancy should be treated when (like "pertinence" or "materiality") it is made an element of a criminal offense. It is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another. The question of probable cause to conduct a search, for example, is resolved by the judge when it arises in the context of a motion to suppress evidence obtained in the search; but by the jury when it is one of the elements of the crime of depriving a person of constitutional rights under color of law, see 18 USC §§ 241-42. Cf. *United States v. McQueeney*, 674 F.2d 109, 114 (CA1 1982); *United States v. Barker*, 178 U.S. App. D.C. 174, 546 F.2d 940, 947 (CADC 1976).[9]

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submitted to the members if military status is an element of the offense. See *United States v. McGinnis*, 15 M.J. 345 (1983); *United States v. Marsh*, 15 M.J. 252 (1983); *United States v. McDonagh*, 14 M.J. 415 (1983); *United States v. Laws*, 11 M.J. 475, 476 (CMA 1981) (opinion of Cook, J.).

[9] Article 51(b), UCMJ, 10 USC § 851(b), addresses the proper procedure for handling "all questions of law and all interlocutory questions arising during the proceedings ...." Article 51(c), however, addresses the proper procedure for handling "the elements of the offense ...." Avoiding a constitutional problem (see *Weiss v. United States*, 510 U.S. 163, 176-81, 127 L. Ed. 2d 1, 114 S. Ct. 752 (1994)), I would construe these provisions in accordance with *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1996), and recognize that "it is commonplace for the same mixed question of law and fact to be assigned to the court for one

515 U.S. at 520-21 (emphasis added).

Admittedly, this Court's opinion 35 years ago in *United States v. Carson*, 15 U.S.C.M.A. at 408, 35 C.M.R. at 380, might be viewed as counter to Gaudin. Carson suggests in dicta that a law officer, not a court of members, must decide whether a disobeyed order was lawful in a disobedience-of-orders case. However, Carson was decided thirty years before Gaudin and its dicta rests largely on civilian authorities overturned or limited by the Gaudin decision. See *United States v. Ornelas*, 2 U.S.C.M.A. at 100, 6 C.M.R. at 100. See also *Dennis v. United States*, 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857. Moreover, in a subsequent case, this Court more narrowly applied the Carson dicta to the particular situation where a law officer construed a regulation as inapplicable as a matter of law to the order violated. See *United States v. Phillips*, 18 U.S.C.M.A. at 234-35, 39 C.M.R. at 234-35. See also *United States v. Austin*, 27 M.J. at 230-31.

In any event, where a regulation is found applicable as a matter of law to a disobeyed order but its violation is at issue, we have held, consistent with Gaudin, that this question must be sent to the members to resolve depending on the facts and circumstances of a particular case. See *United States v. Smith*, 21 U.S.C.M.A. 231, 235, 45 C.M.R. 5, 9 (1972); *United States v. Robinson*, 6 U.S.C.M.A. at 356, 20 C.M.R. at 72. See also *United States v. Carson*, supra 15 U.S.C.M.A. at 409, 35 C.M.R. at 381; *United States v. Gray*, 6 U.S.C.M.A. 615, 618-20, 20 C.M.R. 331, 334-36 (1956); *United States v. Phillips,*

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purpose, and to the jury for another." Id. at 521.

supra at 235, 39 C.M.R. at 235; *United States v. Ornelas, supra* 2 U.S.C.M.A. at 101, 6 C.M.R. at 101.[10]

It must be recognized that Gaudin definitively explained a jury's responsibility to decide all the elements of a charged offense. See *United States v. Swindall*, 107 F.3d 831, 835 (11th Cir. 1997). Some circuits have subsequently attempted to distinguish Gaudin where the question withheld from the jury constitutes a pure question of statutory construction. See *United States v. Credit*, 95 F.3d 362, 364 (5th Cir. 1996), cert. denied, 519 U.S. 1138, 136 L. Ed. 2d 886, 117 S. Ct. 1008 (1997); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995). However, in appellant's case, the military judge and the Court of Criminal Appeals found as fact that appellant's unit was on

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[10] The majority suggests a different practice based on dicta in *United States v. Carson*, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965), and its gloss of the discussion to various Rules for Court-Martial. (___ MJ at 14-15) I disagree for several reasons. First, the Military Judges' Guide (now the Benchbook) for some 30 years has expressly recognized and followed this approach. See para. 4-29, Military Judges' Guide (Dept. of the Army Pamphlet 27-9 (1969)). Second, *United States v. Carson*, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965), and paragraph 57b, Manual for Courts-Martial, United States, 1969 (Revised Edition), cited by the majority, actually recognized and approved the Ornelas procedure. Third, although the President promulgated paragraph 57b, 1969 Manual, supra, this provision did not exist prior to 1969 and was omitted in the binding provisions of all versions of the Manual starting in 1984. Fourth, the Manual for Courts-Martial makes it quite clear that the Discussion [see ___ MJ at (14)] is not an enforceable part of the Manual. Para. 4, Discussion, Part I, Preamble. Finally, the Discussion of RCM 801(e)(5) only provides that the legality of orders may be questions of fact; it does not say who decides these questions of fact. Accordingly, this is not a case asking whether a certain longstanding military procedure is constitutional as presented in *Weiss v. United States*, 510 U.S. at 176-81, but instead is a case where this appellate court institutes a new military procedure inconsistent with that longstanding practice; see *United States v. Scheffer*, 523 U.S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998).

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maneuvers and that safety conditions arising from the deployment of appellant's unit to Macedonia warranted the wearing of the United Nations badges and accoutrements. Accordingly, the post-Gaudin decisions on elements raising pure questions of law are not relevant here.

Even if the trial judge correctly decided appellant's challenge based on AR 670-1 as a pure question of law, error under Gaudin still occurred in this case.[11] The military judge might have concluded that appellant's regulatory challenge was not applicable to the order disobeyed in this case (see *United States v. Phillips, supra)* or that the regulation conferred no right on appellant to disobey his commander's order (see *United States v. Hangsleben*, 8 U.S.C.M.A. 320, 322-23, 24 C.M.R. 130, 132-33 (1957)). Nevertheless, he was still required to instruct the members that they must determine the lawfulness of the violated order in this case in general without regard to appellant's legally rejected claims of unlawfulness (i.e., the general-inference-of-lawfulness question). See Article 51(c) and paras. 14 and 16, Part IV, Manual, supra (1995 ed.). Error under Gaudin occurred on this basis as well.

IX

Harmless Error under *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999)

Having concluded that the military judge erred in removing the question of the lawfulness of order allegedly violated in this

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[11] Appellant's additional arguments are that the UN-patches-and-cap order violated the constitutional prohibition against involuntary servitude (Amend. XIII), the UN Participation Act, and his enlistment contract. These arguments pertain to the legality of his unit's deployment order to Macedonia as part of the UN Peacekeeping Force, not the legality of the order to wear the UN accoutrements in Germany prior to that deployment. See *United States v. Lenox*, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).

case from the members' consideration, a question of prejudice remains. See *Neder v. United States, supra* at 4. In Neder, the Supreme Court held that a federal district court's refusal to submit the materiality element of offenses under the federal tax, mail, wire, and bank-fraud statutes was subject to harmless-error analysis. *Id. at 4.* It further held such error as to the tax fraud was harmless in Neder's case because based on the whole record it concluded "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 15.

The Supreme Court in Neder clearly delineated the harmless-error inquiry required for the type of error we have in the instant case, as follows:

We believe that where an omitted element is supported by uncontroverted evidence, this approach reaches an appropriate balance between "society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made." *Connecticut v. Johnson*, 460 U.S. [73] at 86, [103 S. Ct. 969, 74 L. Ed. 2d 823 (1983)] (plurality opinion). The harmless-error doctrine, we have said, "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, ... and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." [Delaware v.] Van Arsdall, supra, [475 U.S.] at 681, [106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)]. At the same time, we have recognized that trial by jury in serious criminal cases "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" *Gaudin*, 515 U.S. at 510-511 (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)). In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting

the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.

Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.

527 U.S. at 18-19 (emphasis added).

Turning to the present case, the Government was required to prove to the members the essential elements of the offense of disobedience of orders, including the lawfulness of the order to wear the UN patches and cap. See *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310, and Article 51(c), UCMJ. In this regard, it normally would be entitled to rely on an inference of lawfulness provided by the President in paragraph 14c(2)(a)(i), Part IV, 1984 Manual, supra (1995 ed.). However, the defense evidenced paragraph 3-4(k), AR 670-1 (1 Sept. 1992), and paragraph 113, Part IV, Manual, supra (1995 ed.) (wearing unauthorized insignia as offense under Article 134). The former provided that "foreign badges, distinctive unit insignia and regiment distinctive insignia will not be worn on these uniforms [BDUs]." The latter prohibited the unauthorized wearing of "insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform," in violation of Article 134.

This is some evidence that appellant's order to wear UN badges was "patently illegal" because it "directed the commission of a crime." Para. 14c(2)(a)(i), Manual, supra

(1995 ed.); see Article 92(1) (Disobedience of a Lawful General Regulation). See also *United States v. White*, 17 U.S.C.M.A. 211, 214, 38 C.M.R. 9, 12 (1967) (evidence of violated regulation sufficient to offset presumption confinement lawful); cf. *United States v. Wartsbaugh*, 21 U.S.C.M.A. 535, 540, 45 C.M.R. 309, 314 (1972) (where no evidence order violated regulation, defense evidence insufficient to rebut presumption of lawfulness of order). In these circumstances, the Manual for Courts-Martial generally provides that the Government must prove the lawfulness of the disobeyed order without benefit of the inference of lawfulness, and it was required to affirmatively show that the order did not violate paragraph 3-4(k), AR 670-1; see *United States v. Wartsbaugh, supra*. As noted above, paragraph 1-18 permits a commander to "require the wearing of organizational protective or reflective items or other occupational health or safety equipment with the uniform when safety considerations make it appropriate." (Emphasis added.) Moreover, paragraph 2-6d provides that "the commander in charge of units on maneuver may prescribe the uniform to be worn within the maneuver area." (Emphasis added.) Accordingly, the prosecution could easily meet its burden by proving as fact to the members that the wearing of the UN badges and cap was otherwise authorized by an authority superior to that issuing the U.S. Army Uniform Regulation (Department of the Army) or that the above-cited sections of the uniform regulation authorized the wearing of the UN accoutrements.

As noted earlier in this opinion, it was uncontroverted in appellant's case that he was ordered to wear the UN badges and cap pertinent to the official deployment of his unit to Macedonia as part of a peacekeeping mission. (R. 581) Its mission was "to observe, monitor, and report along the Macedonian and Serbian border." (R. 581) It was also uncontroverted that the order to wear these badges was given

by his commanders as part of the operations plans for the mission and for safety purposes. (R. 710; 667). Finally, although the defense asserted that there were questions of fact to decide in this case, it proffered no evidence that the safety conditions in Macedonia did not make the wearing of these badges appropriate or that this deployment was not a maneuver within the meaning of AR 670-1. See *United States v. Wartsbaugh, supra* at 540, 45 C.M.R. at 314; *United States v. Smith*, 21 U.S.C.M.A. at 234-35, 45 C.M.R. at 8-9. Accordingly, there was no real contest in this case on the lawfulness of this order in terms of this regulation, and appellant was not prejudiced by the failure of the military judge to instruct on this element of the offense. See also *Johnson v. United States*, 520 U.S. at 470.

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Conclusion

In sum, I conclude that the military judge erred in withdrawing from the members' consideration an element of the charged offense of disobedience of orders, i.e., the lawfulness of the order disobeyed. See generally *United States v. Gaudin, supra*. See *Unger v. Ziemnick*, 27 M.J. at 358; *United States v. Robinson*, 6 U.S.C.M.A. 347, 20 C.M.R. 63. However, this error in my view was harmless beyond a reasonable doubt in this case. See *Neder v. United States, supra*. There was overwhelming evidence presented in this case, uncontroverted by the defense, that the order to wear the UN patches and cap was lawful, i.e., it was properly authorized, related to a military duty, and violated no applicable service uniform regulations. See generally para. 16c(1)(a) and (c), Part IV, Manual, supra (1995 ed.). Accordingly, I join my colleagues in affirming appellant's conviction in this case.

In reaching this legal decision, I am not unmindful of the concept of military duty. When one takes a broad view of the

factual context and circumstances of the order Specialist New was given, it is clear that he had a duty to obey it. Specialist New was being sent in harm's way at the command of his Nation. The wearing of UN insignia and headgear would only help him and his fellow soldiers to more safely perform their peacekeeping mission to Macedonia. New had a duty to his unit a duty to help his unit accomplish its mission with the least risk of loss of life. I am reminded of a passage of Justice Oliver Wendell Holmes, Jr., in an address to the Harvard Graduating Class of 1895. The speech was entitled, "The Soldier's Faith," and it clearly reflected the views of a Judge who in his youth had seen war as a soldier:

In the midst of doubt, in the collapse of creeds, there is one thing I do not doubt ... and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use.

"The Soldier's Faith," May 30, 1895, in Holmes, Speeches 56,59 (1913).

Although I have found legal error in this case, I find that the error in the context of this case was harmless beyond a reasonable doubt, and I see no reason to reverse this case. See also Article 59(a), UCMJ, 10 USC § 859(a). As the renowned English Judge, Sir John Powell, so wisely said a long time ago:

Let us consider the reason of the case. For nothing is law that is not reason. <3>

<3> Coggs v. Bernard, 2 Lord Raymond Reports 909, 911 (1703).

EVERETT, Senior Judge (concurring in part and concurring in the result):

I concur fully with the principal opinion that the defense challenge for cause was properly denied.

In deciding whether an issue as to lawfulness of the order should have been submitted by the military judge to the court-martial members, my starting point is the Uniform Code of Military Justice's provision that in a general or special court-martial the military judge "shall rule upon all questions of law and all interlocutory questions arising during the proceedings." See Article 51(b), 10 USC § 851(b). An "interlocutory question" may involve fact, law, or both. For example, if the question concerns admissibility of a confession made while the accused was a suspect, the judge will decide any factual dispute as to whether the accused was a suspect at the time of the statement and whether a warning was given pursuant to Article 31(b), UCMJ, 10 USC § 831(b). If the dispute is not whether certain language was spoken by way of warning but whether the language sufficed to meet the requirements of Article 31(b), the judge will decide this issue of law in determining the "interlocutory question" of admissibility. Finally, if the dispute concerns not only the fact of whether any warning was given but also whether the language used was sufficient to satisfy Article 31(b), the judge must determine the facts and may then confront a question of law in deciding the "interlocutory question." See generally *United States v. Miller*, 31 M.J. 247 (CMA 1990).

Likewise, if the defense by motion to dismiss raises an issue of sufficiency of the evidence, the military judge will decide as an "interlocutory question" whether, if all the prosecution evidence is believed by the court-martial members, they could reasonably find the accused guilty beyond a reasonable doubt. However, when the ultimate question of guilt or innocence is submitted to the court-martial members, the military judge must refrain from deciding any issue of fact; and if he does make such a decision, he has erred. On the other

hand, the military judge must instruct the court-martial members as to matters of law; and, in so doing, he may have to decide a "question of law." That "question of law" is not to be presented to the court-martial for second-guessing on their part.

In my view the roles of the military judge and the court-martial members correspond to those of judge and jury in federal criminal trials. This result -- although probably not constitutionally required -- was intended by Congress when the Uniform Code of Military Justice was enacted a half century ago. When Congress later passed the Military Justice Act of 1968 and changed the "law officer" title to "military judge," it made this intent even clearer. Accordingly, I conclude that precedents like *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) -- which apply to trials in a federal district court -- apply equally to courts-martial. Therefore, in a fraud case tried in a court-martial, the members would have the same responsibility to decide whether the accused's statements were "material" that civilian jurors would have if the case were tried in a federal district court; and the trial judge -- whether a federal district judge or a military judge -- should give the same instructions as to materiality. Failure to give such instructions in a trial by court-martial should carry the same consequences as would the same failure of a federal district judge in a criminal trial.

New was convicted of disobeying an order in violation of Article 92(2), UCMJ, 10 USC § 892(2). The explicit language of Article 92(2) states that conviction requires a "lawful order", cf. Art. 92, 10 USC § 992. However, even without this language, the requirement of lawfulness of the order would be implied. According to appellant, that requirement was not complied with and -- at the very least -- the court-martial members should have been instructed thereon. The analogy drawn is to the reversible failure to instruct on materiality in Gaudin.

In Gaudin, a consideration of facts was necessary to decide materiality, but in the case at bar, the facts on which appellant chiefly relies to raise an issue as to lawfulness are not even admissible in determining New's guilt or innocence. Appellant's defense that the order given him was not lawful rests largely on the premise that the order was given incident to a military operation that was beyond the constitutional authority of the President and Congress. In my view, the doctrine of "political question" precluded the court-martial -- whether the military judge or the court members -- from considering evidence as to this defense. According to this doctrine, certain issues are non-justiciable because their decision by a court would unduly hamper the Executive and Legislative Branches and violate separation-of-powers theory. Cf. *Harisiades v. Shaughnessy*, 342 U.S. 580, 589, 96 L. Ed. 586, 72 S. Ct. 512(1952). The constitutionality of the military operation to which appellant was assigned presents a "political question" not suitable for a court-martial or a district court to decide. Moreover, I am unsure that, for purposes of standing, New had a sufficient individualized interest to contest in a court-martial for disobedience the constitutionality of the military operation to which he was assigned. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974). Since appellant's contention as to unlawfulness of the order sought to present an issue that could not properly be considered by the court-martial, it required no instruction by the military judge to the court-martial members -- just as no jury instruction as to lawfulness of the order would have been required if lawfulness of the order had been at issue in a federal criminal trial.

In other contexts an entirely different approach may be required. For example, if no political question exists and the accused has standing to raise a pure question of law, the military judge will need to decide that question but will have no

reason to submit that question to the court-martial members. For example, if the question is whether an order was given pursuant to a statute which violated the Constitution, this "question of law" will be decided by the military judge without instructing the members to consider the constitutionality of the statute. Such a question is quite unlike the issue of materiality in the Gaudin case, as to which the Supreme Court held that the trial judge should have instructed the jurors.

On the other hand, in *Unger v. Ziemniak*, 27 M.J. 349 (CMA 1989), the Court recognized that as to disobedience of an order there may be not only a legal issue for final determination by the military judge, but also a factual issue to be decided by the court-martial members under proper instructions. The question of law for the judge concerned whether, under any circumstances, an officer could be ordered to provide a urine specimen to an enlisted person to be tested for drugs. The factual determination -- to be made by the court-martial members -- concerned whether the order given the accused had required that her urine specimen be provided under degrading and humiliating conditions.* Id. at 359.

I can conceive of other situations in which the issue of lawfulness of an order should be submitted to the court-martial members under proper instructions. For example, if an order was lawful only if it called for performance within a specific geographic area and during a specific time period, the court-martial members must decide the facts as to that time and place. What if the questioned order was given by company commander Captain David to his subordinate, Sergeant Uriah,

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* This is a situation like those referred to in the current Manual's Discussion accompanying RCM 801(e)(5) quoted in Chief Judge Crawford's opinion when it states that "it is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact ...."

who disobeyed it because he believed that David was trying to get him killed and steal his wife Bathsheba? 2 Samuel 11 and 12. In that case, the intent of David might present a question of fact to be determined by the court-martial members under proper instructions.

In addition to relying on the alleged unconstitutionality of the military operation in which appellant New was ordered to deploy, the defense also claims that a factual question was raised as to the existence of safety considerations for the orders. If a question of fact as to safety considerations was raised by the evidence concerning lawfulness of the contested order, this question would be for the court-martial members to decide under proper instructions. However, even a failure to instruct on an element of an offense is subject to harmless error analysis under some circumstances. Cf. *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999). In this case, I conclude that if there was any question of fact as to whether the order to wear battle dress insignia promoted safety, it was so insubstantial that the judge's failure to instruct thereon was not reversible error.

Since I conclude that, if the military judge erred at all, the error was not prejudicial to New, I concur in affirming the decision below.

United States Constitution, Article II,
Section 2, Clauses 1 and 2

Section 2, Clause 1. Commander in Chief--Opinions of department heads--Reprieves and pardons.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Section 2, Clause 2. Treaties--Appointment of officers.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

United States Constitution,
Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution,
Amendment 13

Sec. 1. [Slavery prohibited.]

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. [Power to enforce amendment.]

Congress shall have power to enforce this article by appropriate legislation.

United Nations Charter
Chapter VI

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the

obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

United Nations Charter
Chapter VII

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they remembers.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

10 U.S.C. Section 851

Section 851. Art. 51. Votings and rulings

(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title [10 USCS Section 852] (article 52), beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them--

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

10 U.S.C. Section 892

Section 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter [10 USCS Sections 801 et seq.] who--

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

22 U.S.C. Section 287d

Section 287d. Use of armed forces; limitations

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That, except as authorized in section 7 of this Act [*22 USCS Section 287d-1*], nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.

22 U.S.C. Section 287d-1

Section 287d-1. Noncombatant assistance to United Nations

(a) Armed forces details; supplies and equipment; obligation of funds; procurement and replacement of requested items. Notwithstanding the provisions of any other law, the President, upon the request by the United Nations for cooperative action, and to the extent that he finds that it is consistent with the national interest to comply with such requests, may authorize, in support of such activities of the United Nations as are specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter--

(1) the detail to the United Nations, under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time: Provided, That while so detailed, such personnel shall be considered for all purposes as acting in the line of duty, including the receipt of pay and allowances as personnel of the armed forces of the United States, credit for longevity and retirement, and all other perquisites appertaining to such duty: Provided further, That upon authorization or approval by the President, such personnel may accept directly from the United Nations (a) any or all of the allowances or perquisites to which they are entitled under the first proviso hereof, and (b) extraordinary expenses and perquisites incident to such detail;

(2) the furnishing of facilities, services, or other assistance and the loan of the agreed fair share of the United States of any supplies and equipment to the United Nations by the National Military Establishment [Department of Defense], under such terms and conditions as the President shall determine;

(3) the obligation, insofar as necessary to carry out the purposes of clauses (1) and (2) of this subsection, of any funds appropriated to the National Military Establishment [Department of Defense] or any department therein, the procurement of such personnel, supplies, equipment, facilities, services, or other assistance as may be made available in accordance with the request of the United Nations, and the replacement of such items, when necessary, where they are furnished from stocks.

(b) Reimbursement from United Nations; waiver of reimbursement. Whenever personnel or assistance is made available pursuant to the authority contained in subsection (a)(1) and (2) of this section, the President shall require reimbursement from the United Nations for the expense thereby incurred by the United States: Provided, That in exceptional circumstances, or when the President finds it to be in the national interest, he may waive, in whole or in part, the requirement of such reimbursement: Provided further, That when any such reimbursement is made, it shall be credited, at the option of the appropriate department of the National Military Establishment [Department of Defense], either to the appropriation, fund, or account utilized in incurring the obligation, or to an appropriate appropriation, fund, or account currently available for the purposes for which expenditures were made.

(c) Additional appropriation authorizations. In addition to the authorization of appropriations to the Department of State contained in section 8 of this Act [*22 USCS Section 287e*], there is hereby authorized to be appropriated to the National Military Establishment [Department of Defense], or any department therein, such sums as may be necessary to reimburse such Establishment [Department of Defense] or department in the event that reimbursement from the United

Nations is waived in whole or in part pursuant to authority contained in subsection (b) of this section.

(d) Disclosure of information. Nothing in this Act [*22 USCS Sections 287* et seq.] shall authorize the disclosure of any information or knowledge in any case in which such disclosure is prohibited by any other law of the United States.

Army Regulation 670-1
Part One – General Information and Responsibilities
Chapter 1 – Introduction

Paragraph 1-18. Wear of organizational protective or reflective clothing.

Commanders may require the wear of organizational protective or reflective items or other occupational health or safety equipment with the uniform when safety considerations make it appropriate. These items will be furnished at no cost to the individual.

Chapter 2 – Responsibilities

Paragraph 2-6d.

The Commander in charge of units on maneuver may prescribe the uniform to be worn within the maneuver area.

Army Regulation 670-1
Part Two – Utility and Selected Organization Uniform
Chapter 3 – Temperate and Hot Weather Battle
Dress Uniforms [Selected sections]

3-1. Authorization for wear

The temperate and hot weather battle dress uniforms (BDUs) are authorized for year-round wear by all personnel when prescribed by the commander.

3-3. Occasion for wear

BDUs may only be worn on duty when prescribed by the commander. They are not for travel, nor for wearing off military installations except in transit between the individual's quarters and duty station. See paragraph 2–6c for exceptions to this policy. These uniforms are issued as utility, field, training, or combat uniforms and are not intended to be worn as all–purpose uniforms when other uniforms are more appropriate.

3–4. Insignia and accouterment

Insignia and accouterments authorized for wear with these uniforms are—

a. Badges (subdued).

(1) Combat and special skill badges (pin on or embroidered) (para 28–17a).

(2) Special skill tabs (para 28–17c).

(3) Subdued identification badges (para 28–18i through m).

b. Brassards (para 27–27).

c. Branch insignia (paras 27–10b and 27–12b).

d. Combat Leaders Identification (para 27–20).

e. Distinctive infantry insignia (para 27–28).

f. Grade insignia (paras 27–5, 27–6, and 27–7).

g. Headgear insignia (para 27–3).

h. Subdued shoulder sleeve insignia, current organization (para 27–16e(2)).

i. Subdued shoulder sleeve insignia, former wartime service (para 27–17c(2)).

j. Name and U.S. Army distinguishing tapes (paras 27–22a and 27–22b).

k. Foreign badges, distinctive unit insignia, and regiment distinctive insignia will not be worn on these uniforms.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5023

United States *ex rel.* Michael G. New, v. Donald H. Rumsfeld, Secretary of Defense, *et al.*

PETITION FOR REHEARING EN BANC

Pursuant to Rule 35(b), Federal Rules of Appellate Procedure, and Circuit Rule 35, Rules of the District of Columbia Circuit, Appellant Michael G. New ("Mr. New") petitions this Court for a rehearing en banc of the above-entitled case. The three-judge panel opinion in United States *ex rel.* Michael G. New v. Rumsfeld, 448 F.3d 403 (D.C.Cir. 2006) ("Panel Opinion"), was decided on May 23, 2006, and is set forth on pages A-1 through A-6 of the Addendum hereto.

STATEMENT OF REASONS FOR GRANTING THE PETITION

The Need to Secure and Maintain Uniformity in This Court's Decisions.

The three-judge panel wrongly sanctioned the district court's Fed. R. Civ. P. Rule 12(b)(6) dismissal of Mr. New's complaint prosecuting a non-habeas corpus collateral attack on his court-martial conviction, erroneously applying "a vague and watered-down standard [of review] of ... fair consideration"[1] that: (a) had previously been expressly

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[1] *See* Panel Opinion, A-3.

rejected by this Court in Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969); and (b) is in direct conflict with the established precedent of this Circuit that, in a non-habeas collateral attack against a court-martial conviction, "constitutional rulings" of military courts must be found to be "correct by prevailing Supreme Court standards ... unless it is shown that conditions peculiar to military life require a different rule." *Id.* *See* Avrech v. Secretary of the Navy, 477 F.2d 1237, 1243-44 (D.C. Cir. 1973), *rev'd on other grounds*, 418 U.S. 676 (1974); Cothran v. Dalton, 83 F. Supp. 2d 58, 64 (D.D.C. 1999). Consequently, due to the confusion wrought by the panel opinion, neither lawyers nor the district court can know whether this Court's Kauffman standard of review has been *sub silentio* overruled by the panel or still governs the legal sufficiency of such complaints under Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. *See, e.g.*, Cothran v. Dalton, 83 F. Supp. 2d at 63 (Rule 12(b)(1) and 12(b)(6) motions to dismiss) and Williamson v. Secretary of the Navy, 395 F. Supp. 146, 147 (D.D.C. 1975) (motion for summary judgment).

This Proceeding Involves Two Additional Questions of Exceptional Importance.

(1) Whether the panel's ex post facto abandonment of an established standard of review unfairly prejudices a litigant's right to collateral review of his court-martial conviction. Mr. New reasonably relied upon, and properly pled his case under, the Kauffman standard of review — "the governing precedent in this Circuit." *See* United States *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 89 (D.D.C. 2005). Yet the panel upheld the district court's dismissal of his complaint under Rule 12(b)(6) on the basis of an entirely new standard, in direct contradiction to the standard of review that has

prevailed in this Circuit for nearly 40 years. *Compare* Panel Opinion, A-3, *with* Kauffman, 415 F.2d at 997.

(2) Whether the panel abandoned the federal rule requiring that it "read the facts alleged in the complaint in the light most favorable to petitioner[]" and affirm the dismissal of a complaint **only** if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations'" in adjudicating a Fed. R. Civ. P. Rule 12(b)(6) motion. *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-250 (1989). Contrary to Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) and Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979), the panel failed to give Mr. New's complaint the "spacious" and "liberal" reading required under Rule 12(b)(6), erroneously: (a) disregarding Mr. New's well-pleaded allegation that, by Stipulation of Fact at his court-martial, the U.N. uniform that he was ordered to wear was *prima facie* unauthorized; and (b) attributing to Mr. New's "defense" the government's claim that, pursuant to an army regulation, the otherwise unauthorized U.N. uniform was permitted. *Compare* Panel Opinion, A-1 *with* Second Amended Complaint for Declaratory Judgment, Injunctive Relief and an Order in the Nature of a Writ of Mandamus Amending Petition for Writ of Habeas Corpus ("Compl.") ¶¶ 9-14, and 39-44, R. 48, J.A. 19-21.[2]

ARGUMENT

I. THE DEFERENTIAL STANDARD OF REVIEW ADOPTED BY THE PANEL FAILS TO

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[2] Record references are to the district court Docket Sheet entries, and are designated "R." References to the previously-filed Joint Appendix in this Court are designated "J.A."

DISCHARGE THE CONSTITUTIONAL DUTY OF THIS COURT.

It is well established that a member of America's armed forces is duty-bound to obey **only** "lawful" orders. As Judge Sullivan observed in United States v. New, 55 M.J. 95, 115 (2001), "[t]housands of military orders are given each day in our armed forces [and] Article 92(2), Uniform Code of Military Justice, 10 U.S.C. § 892, legislatively reflects the traditional Anglo-American view that only the disobedience of 'lawful' orders is prohibited." So entrenched is this duty to obey **only lawful orders** that a service member charged with violating the "law of war" may not excuse that violation by the defense that he was only following the orders of his superior. *See* Army Field Manual 27-10, the Law of Land Warfare.

When the nation is at war, as it is today in Afghanistan and Iraq, this military code of conduct is most severely tested. Yet, before the National Press Club on February 17, 2006, in response to the question — "should people in the U.S. military disobey orders that they believe are illegal?" — General Peter Pace, Chairman of the Joint Chiefs of Staff, unhesitatingly replied: "**it is the absolute responsibility of everybody in uniform to disobey an order that is either illegal or immoral.**" http://www.jcs.mil/chairman/speeches/060217NatPressClubLunch.html (emphasis added).

It is one thing for the nation's chief military spokesman to affirm — **in the court of public opinion** — a soldier's duty to obey **only lawful** orders. It is quite another — **in a court-martial proceeding** — to recognize that duty when an individual member of the armed forces **actually** refuses to obey an order, as was the case when, on October 10, 1995,

Army Specialist Michael New refused to obey an order to "to wear the prescribed uniform for the deployment [of his unit] to Macedonia, i.e., U.N. patches and cap," on the grounds that it was an unlawful order. *See* Compl., ¶ 8, R. 48, J.A. 10-11.

Facing court-martial charges of disobedience of a lawful order in violation of Article 92(2) of the Code of Military Justice (10 U.S.C. § 892(2)), the military judge ruled that the central issue of the case — the lawfulness of the order — was **not** an element of the offense, and consequently, the prosecution did not have the burden of proving beyond a reasonable doubt the lawfulness of the order. *See* Compl., ¶¶ 18-22, R. 48, J.A. 15-16. This ruling to take the question of lawfulness away from the military jury — and as a consequence, to place the burden of "proving illegality" upon Mr. New[3] — was affirmed by a three-to-two vote of the Court of Appeals of the Armed Forces, despite the observation by one of the minority judges that the military judge's ruling constituted a "radical departure from our political, legal and military tradition." United States v. New, 55 M.J. at 115, 120-25 (Sullivan, J., concurring in the result).

In Count I of his complaint collaterally attacking his conviction and sentence, Mr. New alleged that this "radical departure" did not conform to Supreme Court standards of due process of law (*see* Compl., ¶¶ 30, 39-41, R. 48, J.A. 18, 19-20), which this Court in Kauffman held were necessary "to protect the rights of servicemen." Kauffman, 415 F.2d at 997. According to the panel, however, a serviceman's rights — even his "right" to disobey an unlawful order — are

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[3] *See* United States v. New, 55 M.J. 95, 108 (2001) ("An order is presumed lawful and the defense has the burden of proving illegality unless the order is 'palpably illegal on its face.'").

protected sufficiently so long as the military courts have given "fair consideration" to the serviceman's claim. *See* Panel Opinion, A-3.

By so deferring to the military courts, the panel has sent a message to every member of the armed forces that what the head of the Joint Chiefs of Staff has told the American people — that it is "every" service member's "absolute responsibility" to disobey "illegal and immoral order[s]" — is mere military **rhetoric.** The military **reality** is that a member of the armed services may discharge his duty to obey only lawful orders, not only at his peril of being charged with disobedience of a "lawful" order, but at his peril of having to overcome an almost conclusive presumption of lawfulness, as if the issue of unlawfulness were an affirmative defense, rather than part of the prosecution's *prima facie* case that the order was lawful beyond a reasonable doubt.

At stake, then, in this petition for rehearing en banc is whether the military **policy** that only lawful orders are to be obeyed will be reflected in military **practice**. Deferring to the military courts, as the panel has done, provides no check or balance upon the natural inclination of the military to rule in favor of the superior authority — from the commander-in-chief in the White House to the lieutenant in the field — over the soldier, sailor, marine or airman. Indeed, instead of adopting a procedure that would have sent a beneficial message that the primary burden rests with the superior authority to issue **only** lawful orders, the military courts in Mr. New's case chose to send a perilous message to the enlisted man — just obey orders.

If this Court allows the panel opinion to stand, then it will have abandoned members of the armed forces who conscientiously try to perform their duty to obey only lawful

orders and, there[illegible] will have reduced their "absolute responsibility ... to disobey an order that is ... illegal" to mere sentiment, divorced from the practical reality that they have no real choice, but must obey every military order, even if unlawful, or suffer punishment for their refusal.

II. THE PANEL'S DECISION CONFLICTS WITH THE STANDARD OF REVIEW ESTABLISHED IN THIS CIRCUIT IN KAUFFMAN V. SECRETARY OF THE AIR FORCE, 415 F.2d 991 (D.C. Cir. 1969).

In 1969, this Court ruled in Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), that it had jurisdiction of a collateral attack on a military court-martial judgment even though the petitioner was not in custody and, therefore, was not eligible under 28 U.S.C. § 2241 to file a habeas corpus petition. Relying upon United States v. Augenblick, 393 U.S. 348 (1969), this Court concluded that the stigma attached to any military discharge, other than an honorable one, was sufficient to support this Court's jurisdiction to conduct a collateral review of alleged "errors ...[that] rise to a constitutional level." *Id.*, 415 F.2d at 995.

As for the scope of review of any alleged constitutional error, the Kauffman Court concluded that the test of "fairness" set out by the Supreme Court in Burns v. Wilson, 346 U.S. 137 (1953), "requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." Kauffman, 415 F.2d at 997. To that end, the Kauffman Court conducted an independent review of the military courts' resolutions of those issues to ascertain whether the military rulings "disposed of them in accordance with Supreme Court standards." *See id.*, 415 F.2d at 1000.

In the district court below, Judge Friedman at least purported to adhere to the Kauffman standard, and to have reviewed the legal sufficiency of Michael New's constitutional claims contained in his complaint by independently measuring those claims against Supreme Court standards. *See* United States *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 89-90, 92-101 (D.D.C. 2004). However, in its review of Judge Friedman's ruling, the panel completely disregarded the Kauffman standard of review, adopting an entirely new approach whereby Mr. New's constitutional claims were reviewed according to a newly-crafted "more deferential" test of "fair consideration." *See* Panel Opinion, A-2 - A-6.

The panel deferred to the military courts, but **not** pursuant to the Kauffman requirement that the Government "show[] that conditions peculiar to military life require a different [due process] rule." *Compare* Panel Opinion, A-2, *with* Kauffman, 415 F.2d at 997. To the contrary, the panel did **not even acknowledge** the existence — much less the relevance — of Kauffman, even though the Kauffman court had: (a) carefully reviewed the exact same "fair consideration" language in Burns v. Wilson, 346 U.S. 137 (1953), as relied upon by the three-judge panel; and (b) specifically **rejected** the "fair consideration" test as "a vague and watered-down standard," totally inadequate to confer the "benefits of collateral review of military judgments ... [in] civilian courts." *Compare* Kauffman, 415 F.2d at 997, *with* Panel Opinion, A- 2 - A-3.

In an apparent attempt to justify its utter disregard of Kauffman, the panel faulted the district court for treating Mr. New's complaint as a habeas corpus petition rather than as a nonhabeas complaint for collateral review. *See* Panel Opinion, A-2. Then, in reliance upon selected portions of

Schlesinger v. Councilman, 420 U.S. 738 (1975) — admittedly "not a part of the holding" — the panel forged an entirely new rule for this Circuit "that non-habeas review is ... more deferential than habeas review of military judgments." Panel Opinion, A -2- A-3.

The panel's ruling directly contradicts Kauffman. Even a cursory reading of Kauffman establishes that it concerned a **non-habeas collateral attack** on a court-martial conviction. Kauffman, 415 F.2d at 995. Indeed, the Supreme Court in Schlesinger v. Councilman — a case heavily relied upon by the three-judge panel (*see* Panel Opinion, A-2 - A-3) — cited Kauffman in support of its conclusion that Article III courts have jurisdiction of collateral attacks on courts-martial even when such attacks are made by persons not in custody and, therefore, not entitled to habeas corpus review. *See* Schlesinger v. Councilman, 420 U.S. at 752, n. 25. Indeed, even today Kauffman is considered to be the leading case — not only in this Circuit – - extending civilian court collateral jurisdiction over court-martial convictions and sentences. *See, e.g.*, New v. Cohen, 129 F.3d 639, 648 (D.C. Cir. 1997); Homcy v. Resor, 455 F.2d 1345, 1349 (D.C. Cir. 1971); Owings v. Secretary of the Air Force, 447 F.2d 1245, 1261 (D.C. Cir. 1971); Cothran v. Dalton, 83 F. Supp. 2d 58, 63 (D.D.C. 1999); Williamson v. Secretary of the Navy, 395 F. Supp. 146, 147 (D.D.C. 1975); Staton v. Froehlke, 390 F. Supp. 503, 505 (D.D.C. 1975); Stolte v. Laird, 353 F. Supp. 1392, 1395 (1972); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1379 (9th Cir. 1981) (and cases cited). *See also* J. Chapman, "Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review," 57 *Vanderbilt L. Rev.* 1387, 1399-1402 (2004).

In short, had the panel considered Kauffman, it would have found **absolutely no support** for its position that Mr. New's non-habeas collateral attack called for the more "deferential" test of "fair consideration"; rather, the panel would have found that the rule in this Circuit called for its independent "review [of] the constitutional rulings of [the military courts to] find [whether] the[y] [are] correct by prevailing Supreme Court standards." *See* Kauffman, 415 F.2d at 997.

While the panel may have discovered that not all courts of appeal necessarily agreed with Kauffman's standard governing collateral review of court-martial proceedings and convictions (*see* Calley v. Calloway, 519 F.2d 184, 198 n. 21 (5th Cir. 1975)), there is **no** support for the panel's newly-minted, two-tiered standard of review based upon whether the complaint presented a non-habeas, rather than a habeas, collateral attack on a court-martial conviction. *See, e.g.*, R. Rosen, "Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial," 108 *Military L. Rev.* 5, 56-66 (1985); J. Theuman, "Review by Federal Civil Courts of Court-Martial Convictions — Modern Status," 95 A.L.R. Federal 472, 524-41 (1989).

In a vain attempt to bolster its deferential review standard for non-habeas collateral attacks, the panel cited Priest v. Secretary of the Navy, 570 F.2d 1013 (D.D.C. 1977), claiming that Priest applied the panel's version of the standard of review that it had gleaned from Schlesinger v. Councilman. *See* Panel Opinion, A -2. But Priest's reliance upon Schlesinger v. Councilman was limited to the question of whether the court had jurisdiction. Priest, 570 F.2d at 1016. The Priest court did not draw on Schlesinger v. Councilman for the standard of review by which to measure the constitutional claims of the petitioner. Instead, the Priest

court reviewed the petitioner's First and Fifth Amendment contentions to ascertain whether the military courts' disposition of them conformed to Supreme Court standards. *See* Priest, 570 F.2d at 1016-19.

Although the Priest court did not cite Kauffman, it did rely upon Avrech v. Secretary of the Navy, which similarly had limited Schlesinger v. Councilman to the jurisdictional issue. Avrech, 520 F.2d 100, 102 n. 5 (D.C.Cir. 1975). Indeed, when Avrech first came before this Court, it ruled that "[t]he question ... seems settled in this Circuit by Kauffman ... where the court said: 'We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule.'" Avrech v. Secretary of the Navy, 477 F.2d 1237, 1244 (1973), *rev'd on other grounds*, 418 U.S. 676 (1974).[4]

There is, therefore, no legitimate basis whatsoever for the panel to have concluded that the Supreme Court in Schlesinger v. Councilman *sub silentio* established a standard of review different from that established in Kauffman; nor is there any reason to believe that the Supreme Court meant that its standard governing the threshold issue of jurisdiction also serves as the substantive standard of review of the merits of the constitutional claims. *See* Schlesinger v. Councilman, 420 U.S. at 752-53 and n. 25. Had the Supreme Court meant to address the standard of review, it surely would have harkened back to its decision in Burns v. Wilson, which had spawned the "full and fair

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[4] The Supreme Court reversed, holding that the court of appeals had incorrectly applied Supreme Court standards to Avrech's First Amendment contention, not that the court had applied an incorrect standard of review. *See* Secretary of the Navy v. Avrech, 418 U.S. 676, 677-78 (1974).

consideration test," and the interpretative gloss placed upon that test by Kauffman. *See* Schlesinger v. Councilman, 420 U.S. at 752-53. Instead, the High Court declined to review the merits of the petitioner's claim, dismissing the case on equity grounds for failure to exhaust administrative remedies. *Id.*, 420 U.S. at 753-61.

The panel's refusal to follow Kauffman thoroughly confuses the governing precedents in this Circuit, prejudicing other petitioners who, in the future, would seek collateral review of courts-martial and other military judgments adversely affecting their liberties. Not only would such petitioners not know how to evaluate and then draft their collateral attack complaints, but district court judges in this Circuit would not know whether the Kauffman rule, or the panel's "watered-down" rule, applied to Rule 12(b)(6) motions or motions for summary judgment.

III. THE PANEL'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE FOR THE ADMINISTRATION OF COLLATERAL ATTACKS ON MILITARY JUDGMENTS IN THIS CIRCUIT.

Mr. New's collateral attack on his court-martial conviction came to this Court on an appeal from a district court ruling that erroneously granted the government's motion to dismiss on the grounds that New's complaint failed to state a claim upon which relief can be granted. *See* U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d at 83. Purporting to rely upon the standard of review laid down in Kauffman, the district court concluded that Mr. New had failed to state a claim that his court-martial conviction did not meet Supreme Court constitutional standards. *See id.*, 350 F. Supp. 2d at 89, 92. In so doing, District Court Judge Friedman purported to do

as other district court judges in this Circuit have consistently attempted to do since Kauffman — assess Rule 12(b)(6) motions and motions for summary judgment by the Kauffman standard that constitutional issues must be resolved by military officials in conformity to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. *See, e.g.*, Cothran v. Dalton, 83 F. Supp. 2d at 63 (Rule 12(b)(1) and 12(b)(6) motions to dismiss); Huff v. Secretary of the Navy, 413 F. Supp. 863, 867 (D.D.C. 1976) (cross-motions for summary judgment); Staton v. Froehlke, 390 F. Supp. 503, 505, 507 (D.D.C. 1975) (cross-motions for summary judgment); Carlson v. Schlesinger, 364 F. Supp. 626, 628, 631-32 (D.D.C. 1973) (cross motions for summary judgment); Stolte v. Laird, 353 F. Supp. 1392, 1393, 1395 (D.D.C. 1972) (cross motions for summary judgment).

If the panel's opinion is left uncorrected, it virtually bars the courthouse door to Mr. New, who, in specific reliance upon Kauffman, alleged that "Plaintiff was unlawfully and unconstitutionally convicted by a court-martial, as affirmed by [the United States Court of Appeals for the Armed Forces] which failed to conform to U.S. Supreme Court standards, without having shown that conditions peculiar to military life justified such failure." *See* Compl. ¶ 37, R. 48, J.A. 19. Indeed, Mr. New specifically relied upon Kauffman to formulate and to advance his two major constitutional claims: (a) that the military courts' ruling — that lawfulness was not an element of the offense — "unlawfully and unconstitutionally denied his liberty and property without due process of law, contrary to the due process standards set forth by the U.S. Supreme Court in Gaudin v. United States, 515 U.S. 506 (1995), and in Jackson v. Virginia, 443 U.S. 307 (1979)" (Compl. ¶ 41, R. 48, J.A. 20); and (b) that the military courts' ruling — that the legality and

constitutionality of the deployment for which the uniform was prescribed was a nonjusticiable "political question" — "unlawfully and unconstitutionally denied [Mr. New's] right to contest the prosecution's case against him, ... contrary to ... Due Process standards ... set forth ... in Crane v. Kentucky, 476 U.S. 683 (1986), and Simmons v. South Carolina, 521 U.S. 154 (1994)." Compl. ¶ 44, R. 48, J.A. 20.

By its failure to follow Kauffman in its affirmance of the district court's decision granting the Government's motion to dismiss for failure to state a claim upon which relief may be granted, the panel, in effect, assessed the legal sufficiency of Mr. New's complaint by a standard **completely unknown and unknowable** at the time that the New complaint was drafted. Such an *ex post facto* application of a new standard to evaluate the legal sufficiency of Mr. New's complaint is totally unfair and unjust.

IV. THE PANEL FAILED TO APPLY THE FEDERAL RULE GOVERNING THE ADJUDICATION OF A RULE 12(b)(6) MOTION TO DISMISS.

As noted above, this appeal came to this Court on a ruling by the district court granting the defendant's motion to dismiss for failure to state a claim upon which relief can be granted. In assessing the correctness of such a ruling, this Court has consistently adhered to the federal rule that all "statement[s] of material fact [in the complaint] must be accepted as true," and that no facts may be "draw[n] upon ... from outside the pleadings." Taylor v. Federal Deposit Insurance Corp., 132 F.3d 753, 762 (D.C. Cir. 1997). Indeed, "the complaint is [to be] construed liberally in the plaintiff['s] favor ... grant[ing] plaintiff[] the benefit of all inferences that can be derived from the facts alleged."

Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). As the Supreme Court has definitively summarized the governing rule: "[Courts must] read the facts alleged in the complaint in the light most favorable to [the] petitioner[] [a]nd ... only affirm the dismissal of the complaint if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249 (1989).

The panel opinion utterly ignored this fundamental rule. Not once in its opinion did the panel acknowledge that the appeal had been taken from the district court's ruling dismissing Mr. New's complaint on a Rule 12(b)(6) motion. Nor did the panel make any effort to glean the facts of the case from the four corners of Mr. New's complaint. As a result, the panel misstated Mr. New's primary defense against the prosecutor's claim that the order to wear the U.N. uniform was lawful.

As alleged in paragraphs 11 and 14 of Mr. New's complaint, Mr. New's argument concerning the order's illegality was based primarily upon a Stipulation of Fact that the U.N. uniform prescribed for the Macedonian deployment was generally **unauthorized** by constitution, statute, or regulation. *See* Compl. ¶¶ 11, 14, R. 48, J.A. 12, 13. In disregard of this very specific allegation of **fact**, the panel erroneously attributed to Mr. New the prosecution's response to that stipulation — as alleged in paragraph 15 of the Complaint — as if the prosecution's response were Mr. New's primary defense. *Compare* Panel Opinion, A-1 ("New's defense **focused** on the lawfulness of the order — specifically its consistency with Army Regulation 670-1..., which permits commanders to require uniform modifications 'to be worn within [a] maneuver area,' par. 2-6d, or 'when

safety considerations make it appropriate....'" (emphasis added)) *with* Compl. ¶ 15, R. 48, J.A. 13-14. Had the panel read Mr. New's complaint "liberally," as it was required under the federal rule, it would have acknowledged that the prosecution had made this claim in response to the Stipulation of Fact — to which it had agreed at the court-martial — that the uniform was otherwise unauthorized. *See* Compl. ¶¶ 11, 14-15, R. 48, J.A. 12-14.

By its failure to follow the rule governing review of grants of motions to dismiss for failure to state a claim upon which relief can be granted, the panel failed even to consider whether the military courts gave any consideration to New's claim that his court-martial convictions did not conform to the Supreme Court's Due Process standards in Jackson v. Virginia, 443 U.S. 307, 319 (1979): that no conviction may be obtained by the prosecution if no "rational trier of fact could have found the essential element[] of [lawfulness of the order] beyond a reasonable doubt." *See* Compl. ¶ 41, R. 48, J.A. 20 and Brief of Appellant Michael New, p. 29. As clearly alleged in paragraph 15 of Mr. New's complaint, the prosecution **never** supported with **evidence** its contention that the otherwise unlawful U.N. uniform was justified as a "safety" measure in a "maneuver" area; rather, the prosecution supported its position only by **naked argument**. And, even then, the prosecution's argument was internally inconsistent and contradictory, contending on the one hand that "'the wearing of [UN] blue in a hostile environment is the best protection one can have from the boundless chaos of warfare'" and, on the other, that "the Macedonia operation was a noncombatant one ...." *See* Compl. ¶ 15, R. 48, J.A. 13-14. Instead of following the rule governing Rule 12(b)(6) motions, and construing the complaint most favorably to Mr. New, the panel did just the opposite, accepting, as a "presumption," the government's allegation that "safety

considerations justified the uniform order," in disregard of Mr. New's allegation that the parties had stipulated that the uniform was generally unauthorized. *Compare* Panel Opinion, A-5 *with* Compl. ¶ 14, R. 48, J.A. 13.

Thus, even under its inappropriate standard of "fair consideration," the panel's decision is woefully deficient, having been made in disregard of the federal rule governing review of Rule 12(b)(6) motions.

CONCLUSION

For the reasons stated above, Mr. New's petition for rehearing en banc should be granted.

Respectfully submitted,

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July 4, 2006

Second Amended Complaint of Plaintiff Michael G. New, filed March 17, 2004

United States *ex rel.* New v. Rumsfeld, *et al.*
Civil Action No. 96-0033 (PLF)

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND AN ORDER IN THE NATURE OF A WRIT OF MANDAMUS AMENDING PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioner/Plaintiff Michael G. New (hereinafter "Plaintiff") files this amended petition for a writ of habeas corpus in the form of a Second Amended Complaint for Declaratory Judgment, Injunctive Relief, and an Order in the Nature of a Writ of Mandamus seeking collateral review of Plaintiff's January 24, 1996 court-martial conviction and sentence to a bad conduct discharge.

2. After conviction and sentence, Plaintiff has exhausted his military remedies, as follows: (a) on April 28, 1999, the United States Army Court of Criminal Appeals affirmed Plaintiff's conviction and sentence (United States v. New, 50 M.J. 729 (1999)); and (b) on June 13, 2001, the United States Court of Appeals for the Armed Forces affirmed Plaintiff's conviction and sentence (United States v. New, 55 M.J. 95 (2001), *cert. den.*, 534 U.S. 955 (2001).

3. On account of his court-martial conviction and bad conduct discharge, which are unconstitutional, as contrary to U. S. Supreme Court standards governing due process of law, and which are the product of the failure of the military courts to have dealt fully and fairly with Plaintiff's claims of a violation of Article I, Section 9 of the United States Constitution,

Plaintiff has suffered, and continues to suffer, various disabilities imposed as a direct consequence of a punitive discharge, including, but not limited to, and social ostracism and unacceptability arising from the ineradicable stigma of a punitive discharge.

PARTIES, JURISDICTION AND VENUE

4. Petitioner/Plaintiff Michael G. New is domiciled in Willis, Texas.

5. Respondent/Defendant Donald H. Rumsfeld is the Secretary of Defense for the United States of America, and Respondent/Defendant Thomas E. White is the Secretary of the Army. (They are hereinafter referred to collectively as "Defendants.") Defendants are the proper government officials and military authorities with supervisory power over those government and military officials who are specifically authorized and empowered by law to take the necessary action relieving Plaintiff from the continuing disabilities caused by the unconstitutional court-martial conviction and bad conduct discharge suffered by Plaintiff.

6. This court has jurisdiction of Plaintiff's Second Amended Complaint (hereinafter "Complaint") pursuant to 28 U.S.C. Section 2241, as well as 28 U.S.C. Sections 1331, 1361, and 2201.

7. Venue for this Complaint exists in the District of Columbia, the seat of the United States government (4 U.S.C. Section 72), as Defendants are part of the executive department of the United States under 10 U.S.C. Section 101.

FACTS

8. On or about January 26, 1997, Plaintiff, after trial by court-martial, was convicted and sentenced to a bad conduct discharge for violating Article 92(2) of the Uniform Code of Military Justice (10 U.S.C. Section 892(2)), to wit: "In that Specialist Michael G. New, US Army, having knowledge of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same." *Record of Trial*,[1] Volume 1, pp. 15-16, and Volume 6, Exhibits CVI and CVII.

9. On December 5, 1995, prior to his court-martial trial, Plaintiff filed a motion to dismiss, supported by a Memorandum of Authorities, claiming that the October 1995 order requiring Plaintiff to "wear the prescribed uniform for the deployment to Macedonia, i.e., the U.N. patches and cap," as set forth in the court-martial specification, was unlawful because "the order was issued pursuant to the unlawful deployment of Specialist New ... in violation of:

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[1] All references herein to the *Record of Trial* are to the Accused's Copy of a verbatim *Record of Trial* (including allied papers) of Specialist Michael G. New's special court-martial empowered to adjudge a bad conduct discharge tried at Leighton Barracks, Wurzburg, Germany on 24 October, 17 November, 8 and 13, December 1995, and 18-19, and 23-24 January 1996, and furnished to Plaintiff's military appellate counsel. (The excerpts referred to herein have been reproduced and attached to Plaintiff's previously filed Memorandum in Support of his Motion to Reopen Proceeding and Substitute Parties Respondent, and For Leave to File an Amended and Supplemental Petition for a Writ of Habeas Corpus.)

(a) 22 U.S.C. Code Sec. 287d, or in the alternative, 22 U.S.C. Section 287d-1 (Sections 6 and 7 of the United Nations Participation Act);
(b) Article I, Section 8, Clauses 12, 13, 14, and 18 of the United States Constitution;
(c) Article II, Section 2, Para. 1 (the "Commander-in-Chief Clause") of the United States Constitution ; and
(d) Article II, Section 2, Para. 2 (the "Appointments Clause") of the United States Constitution."
[*Record of Trial*, Volume 5, Appellate Exhibit XLVIII.]

10. On December 6, 1995, also prior to trial, Plaintiff filed a further motion to dismiss, supported by a Memorandum of Authorities, claiming that the order "to wear the prescribed uniform for the deployment to Macedonia, i.e., "U.N. patches and cap" was an unlawful order forcing "Specialist New involuntarily to serve as a United Nations soldier thereby depriving him of his rights as a United States soldier in violation of the Thirteenth Amendment of the United States Constitution." *Record of Trial*, Volume 5, Appellate Exhibit LI.

11. On December 6, 1995, again prior to trial, Plaintiff filed a third motion to dismiss, supported by a Memorandum of Authorities, claiming that the order "to wear the prescribed uniform for deployment to Macedonia, *i.e.*, "U.N. patches and cap," was issued in violation of:

(a) Article I, Section 9 (the "foreign emolument and office clause") of the United States Constitution;
(b) 5 U.S.C. Section 7342;
(c) 32 C.F.R. Section 578.19;
(d) Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia* (AR 670-1);

(e) and would subject the defendant to commit a crime under Articles 134 UCMJ, and would subject the defendant to civil penalties under 5 U.S.C. Section 7342. [*Record of Trial*, Volume 5, Appellate Exhibit XLIX.]

12. On January 18, 1996, prior to trial, Plaintiff introduced in evidence sworn testimony and numerous exhibits through retired Marine Lieutenant Colonel David Sullivan, a former CIA analyst and a former U.S. Senate Foreign Relations Committee staff member, who, as a qualified expert in international law, supported Plaintiff's claim that the order to wear the "U.N. patches and cap" violated the United Nations Participation Act because the United Nations operation to which Plaintiff's unit was being deployed was a United Nations Charter Chapter VII combatant operation which required congressional approval, and no such congressional approval had been given. *Record of Trial*, Volume 2, pp. 323-375, Volume 5, Exhibits XXXVII through XLII; and Volume 6, Appellate Exhibits LXIII-LXIIIR and LXXIX.

13. Declining to introduce any sworn testimony to rebut Plaintiff's defense, the prosecution relied solely upon letters from the President of the United States in which the President asserted that the UN operation in Macedonia was a noncombatant Chapter VI operation, not requiring congressional approval, and further maintained that all claims regarding the legality of the deployment to Macedonia based upon the nature of the UN operation were nonjusticiable political questions. *Record of Trial*, Volume 2, 376, 405 and 410-12; Volume 6, Appellate Exhibits LXV-LXVIII.

14. In support of his pretrial motion that the order to wear the "U.N. patches and cap" violated the foreign emoluments prohibition of the Constitution, and related statutes and

regulations, Plaintiff relied upon a "Stipulation of Fact" stating that said patches and cap had "not been approved by the Director of Institute of Heraldry, U.S. Army, as required and mandated under the provisions of paragraphs 27-16a and 27-16b of Army Regulation 670-1, 'Wear and Appearance of Army Uniforms and Insignia'"; that "both the Department of Defense and the Department of the Army have not authorized either informally or formally the United Nations insignia and accoutrements"; and that the "U.N. patches and cap" had been issued to SPC New [only] for the purpose of augmenting his U.S. Army ...B(attle) D(ress) U(niform)." *Record of Trial*, Volume 4, Exhibit P (emphasis original).

15. In response to this claim, the prosecution argued that the "U.N. patches and cap" were justified by paragraph 1-18 of AR 670-1 which provided for alterations in the authorized uniform for "safety" purposes in a "maneuver" area, but introduced no sworn testimony in support of this claim. Rather, the prosecution simply argued that "Macedonia ... is a maneuver area," and that "the wearing of [UN] blue in a hostile environment is the best protection one can have from the boundless chaos of warfare." Simultaneously, the prosecution contended that "the Government does not concede Macedonia is a hostile environment." Nevertheless, the prosecution insisted that UN blue is "recognized internationally as off limits to ... combatants," even while maintaining that "in Macedonia, we don't have that situation," but rather insisting that the Macedonia operation was a noncombatant one as claimed by the President of the United States in his letters. *Record of Trial*, Volume 2, 407-09, 411; Volume 6, Appellate Exhibits LXV-LXVIII.

16. On January 18, 1996, the military trial judge denied the Plaintiff's pretrial motions set forth in Paragraphs 9 and 10 above, ruling against Plaintiff's claims that the Macedonian

deployment violated: (a) the United Nations Participation Act (22 U.S.C. Sections 287d and 287d-1); (b) the Commander-in-Chief Clause and the Appointments Clause of Article II, Section 2 of the U.S. Constitution; and (c) the prohibition against involuntary servitude contained in the Thirteenth Amendment, on three alternative grounds, namely, (i) that Plaintiff's claims were substantively without merit, (ii) that Plaintiff's claims were irrelevant, and (iii) that Plaintiff's claims, even if relevant and meritorious, were nonjusticiable political questions over which the military court had no jurisdiction. *Record of Trial*, Volume 2, 426-433.

17. On January 19, 1996, the military trial judge denied Plaintiff's motion to dismiss described in Paragraph 11 above, ruling against Plaintiff's claim that the October 1995 order to "wear the U.N. patches and cap" violated the constitutional prohibition against foreign emoluments, and related statutes and regulations:

> The wearing of distinctive uniforms or uniform accessories easily recognizable and identifiable in a combat environment or potential combat environment has a practical combat function which may enhance both safety and/or tactical effectiveness of combat-equipped soldiers performing operations. As such, the modification of 1/15th Infantry soldiers' military uniforms ... to include the adding of U.N. military uniform accoutrements, had a function specifically to enhance the safety of United States armed forces in Macedonia. [*Record of Trial*, Volume 2, 426.]

18. On January 19, 1996, the military trial judge also indicated that he intended to rule as a matter of law that the October 1995 order "to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap" was, as

a matter of law, issues to be resolved wholly by the military judge, not the military jury. *Record of Trial*, Volume 2, 433.

19. On January 19, 1996, and prior to the entry of an order so ruling, Plaintiff objected on the grounds that the lawfulness of an order is an "element of the offense which the government must prove beyond a reasonable doubt" and that, by taking the lawfulness issue from the military jury, the military trial judge has "effectively taken away ... the due process guaranteed to Specialist New under the 5th Amendment, by which the government must, beyond a reasonable doubt, prove each and every element of the offense in order to convict...." *Record of Trial*, Volume 2, 434.

20. In response, the prosecution maintained that there were no "factual" issues for a military jury to resolve, every issue being a question of law only. *Record of Trial*, Volume 2, 440-41.

21. In reply, Plaintiff catalogued a number of factual issues, including, but not limited to, the nature of the United Nations Macedonia deployment, whether it was a combatant Chapter VII operation or a noncombatant Chapter VI operation, whether the Macedonian area to which Plaintiff would be deployed was a maneuver area, and whether the "U.N. uniform [would] enhance safety." *Record of Trial*, Volume 2, 443-45.

22. The military judge ruled against Plaintiff, pronouncing the issue of lawfulness of the October 1995 order to be "nothing more than an interlocutory issue ... purely a question of law, so I will, indeed, instruct the members [of the military jury] that, as a matter of law, the order in this case, as described in the specification, if, in fact, there was such an order, was a lawful order." *Record of Trial,* Volume 2, 448-49.

23. At trial, on January 26, 1996, the prosecution presented sworn testimony establishing that on October 3, 1995, and then again on October 4, 1995, Plaintiff was ordered by his commanding officers to report to duty on October 10, 1995, wearing the "U.N. patches and cap" and that Plaintiff appeared in company formation without the U.N. patches and cap. The prosecution offered no testimony concerning any "safety" purpose of the U.N. accoutrements; nor did the prosecution introduce any evidence that either the situs of the formation, Schweinfurt, Germany (where the order was disobeyed), or the deployment destination, Macedonia, was a "maneuver" area. *Record of Trial*, Volume 2, 578-617; Volume 3, 618-629.

24. On January 26, 1996, as previously announced, the military judge instructed the military jury that the order to wear the U.N. patches and cap was lawful, and that Plaintiff had a duty to obey such order, unless the jury could find that Plaintiff had no knowledge of the orders or was reasonably mistaken as to his duty to obey the order. *Record of Trial*, Volume 3, 782-84.

25. After conviction and sentence, Plaintiff prosecuted a timely appeal to the United States Army Court of Criminal Appeals (hereinafter "ACCA").

26. On April 28, 1999, the ACCA denied Plaintiff's appeal and affirmed Plaintiff's conviction, ruling that the lawfulness or unlawfulness of the deployment to Macedonia was either irrelevant to the charge of disobeying the orders to wear the U.N. patches and cap, or was a nonjusticiable political question, and that the military judge had properly ruled, as a matter of law, that the order to wear the U.N. patch and cap was a lawful "safety" measure in a "maneuver" area. United States v. New, 50 M.J. 729, 736-40 (1999).

27. On June 13, 2001, in response to Plaintiff's timely petition for appeal, the United States Court of Appeals for the Armed Forces (hereinafter "CAAF") unanimously affirmed the military judge's ruling that the lawfulness of the order to wear the U.N. patches and cap, insofar as it was dependent upon the lawfulness of the Macedonian deployment, was a nonjusticiable political question. United States v. New, 55 M.J. 95, 108-09, 116, 129-30 (2001).

28. CAAF divided three to two, however, on whether the lawfulness of the orders to wear the U.N. patches and cap at the time and place charged was a legal question solely for the military judge or, as an essential element of the offense, was an issue for the military jury. *Id.* at 100-06, 115-16, 117-26, 129, 130.

29. A plurality of three CAAF judges affirmed the military judge, concluding that the lawfulness of an order "is not a discrete element of an offense under Article 92" of the Uniform Code of Military Justice. *Id.* at 100.

30. Charging the plurality with "a radical departure from our political, legal and military tradition," one CAAF judge maintained that there was no question that "lawfulness ... was an element of the charged offense, and accordingly under Article 51(c) [of the Uniform Code of Military Justice] and United States v. Gaudin, 515 U.S. 506, 522-23 ... should have been presented to the 'military jury.'" Nevertheless, he and his concurring colleague voted with the plurality to affirm Plaintiff's conviction and sentence, deeming the failure of the military judge to submit the issue of lawfulness of the October 10 order to be "harmless error," having concluded that there was no "evidence" in the record that the order was unlawful. *Id.* at 120, 126-28, 130.

31. The CAAF plurality disagreed, insisting that Plaintiff had "clearly produced a large volume of material contesting the lawfulness of the order ... which would be more than sufficient to go before a [military jury]," but that the issue of lawfulness had properly been resolved against Plaintiff as an interlocutory question solely for the military trial judge. *Id.* at 106.

32. At the time of the filing of the original petition for a writ of habeas corpus, Plaintiff was in physical custody of the United States Army awaiting trial by court-martial.

33. In consequence of his court-martial conviction and sentence to a bad conduct discharge, Plaintiff is suffering from the ineradicable stigma of a punitive discharge adversely affecting his legal rights and social acceptability.

34. Plaintiff is suffering, and will continue to suffer, serious disabilities on account of the court-martial conviction and bad conduct discharge.

35. Plaintiff has exhausted his military remedies, having appealed to ACCA, and having petitioned for, and received review from, CAAF.

36. Plaintiff now seeks collateral review of his January 18, 1996 court-martial conviction and his sentence to a bad conduct discharge pursuant to his amended complaint under 28 U.S.C. Sections 1331, 1361 and 2201, amending his original petition for a writ of habeas corpus filed pursuant to 28 U.S.C. Section 2241.

37. Plaintiff was unlawfully and unconstitutionally convicted by a court-martial, as affirmed by CAAF, which failed to conform to U.S. Supreme Court standards, without

having shown that conditions peculiar to military life justified such failure.

38. Plaintiff was also unlawfully and unconstitutionally convicted by court-martial, as affirmed by CAAF, which failed to afford Plaintiff a full and fair opportunity to present his defense that the October 1995 orders requiring him, as an American soldier, to wear the U.N. patches and cap violated the "foreign emolument and office" clause of Article I, Section 9 of the United States Constitution.

COUNT I
(Denial of Due Process Right to Trial by Military Jury)

39. Plaintiff hereby realleges and incorporates by reference each of the foregoing allegations contained in Paragraphs 1-37 as if set forth fully herein.

40. In order to avoid a conflict with the U.S. Supreme Court's ruling in Gaudin v. United States, 515 U.S. 506 (1995), CAAF ruled that lawfulness was not an element of the offense defined by 10 U.S.C. Section 892(2), and therefore, not an issue for the military jury, having adopted a rule of construction governing the ascertainment of the elements of a federal offense out of conformity with the U.S. Supreme Court rule in Neder v. United States, 527 U.S. 1 (1999).

41. As a consequence of the CAAF's ruling that lawfulness is not an element of the offense defined by 10 U.S.C. Section 892(2), Plaintiff was unlawfully and unconstitutionally denied his liberty and property without due process of law, contrary to the due process standards set forth by the U.S. Supreme Court in Gaudin v. United States, 515 U.S. 506 (1995), and in Jackson v. Virginia, 443 U.S. 307 (1979).

COUNT II
(Denial of Due Process Right to a Defense)

42. Plaintiff hereby realleges and incorporates by reference each of the foregoing allegations contained in Paragraphs 1-37 as if fully set forth herein.

43. CAAF's ruling — that Plaintiff's claims, including his claim that said deployment violated Sections 6 and 7 of the United Nations Participation Act (22 U.S.C. Sections 287d and 287d-1), that said deployment violated the Appointments and Commander-in-Chief clauses of Article II, Section 2 of the United States Constitution, and that said deployment violated the ban on involuntary servitude contained in the Thirteenth Amendment to the United States Constitution, were nonjusticiable political questions — did not conform to Supreme Court standards, and was contrary to the law of the United States Constitution.

44. By the CAAF's ruling that said claims of illegality and unconstitutionality were nonjusticiable political questions, Plaintiff was unlawfully and unconstitutionally denied the right to contest the prosecution's case against him, which is contrary to the Due Process standards of the United States Constitution, as set forth and confirmed by the U.S. Supreme Court in Crane v. Kentucky, 476 U.S. 683 (1986), and Simmons v. South Carolina, 521 U.S. 154 (1994).

COUNT III
(Unconstitutional Denial of Defense Not to Accept any Foreign Emolument or Office)

45. Plaintiff realleges and incorporates by reference each of the foregoing allegations contained in Paragraphs 1-36 and 38 as if set forth fully herein.

46. By pretrial motion, Plaintiff claimed that the October 1995 orders to wear the "U.N. patches and cap" violated the provision governing foreign emoluments or offices contained in Article I, Section 9 of the United States Constitution.

47. By a "Stipulation of Fact," agreed to by the prosecution, and by a review of relevant statutes, Plaintiff established a prima facie case of a violation of Article I, Section 9 of the United States Constitution, in that Congress had not consented to any American soldier's receiving the "U.N. patches and cap," which, in fact, is an "emolument" or "office" of a foreign government.

48. Notwithstanding Plaintiff's having established a prima facie case of a violation of Article I, Section 9 of the United States Constitution, he was not afforded a full and fair opportunity by the military tribunals, including the military judge, ACCA and CAAF, to have said claim fully adjudicated on the merits.

49. By failing fully to adjudicate on the merits Plaintiff's defense that the October 1995 orders required Plaintiff to wear the "U.N. patches and cap," in violation of the prohibition in Article I, Section 9 against "[a]ny person holding an Office of ... Trust under [the United States] without the Consent of the Congress [from] accept[ing] any present, Emolument, Office or Title of any kind whatever from any King, Prince of foreign

State," without the Consent of the Congress, as provided for in Article I, Section 9 of the United States Constitution, Plaintiff was unlawfully and unconstitutionally convicted and sentenced without due process of law.

ALTERNATIVE COUNT IV
(Unfair Adjudication of Defense Not to Accept Foreign Emolument or Office)

50. Plaintiff realleges and incorporates by reference each of the foregoing allegations contained in Paragraphs 1-36 and 38 as if set forth fully herein.

51. By pretrial motion, Plaintiff claimed that the October 1995 orders to wear the "U.N. patches and cap" violated the provision governing foreign emoluments and offices contained in Article I, Section 9 of the United States Constitution.

52. By a "Stipulation of Fact," agreed to by the prosecution, Plaintiff established that the "U.N. patches and cap" did not conform to Army Regulation 670-1, thereby presenting a prima facie violation of the foreign emolument and office clause of Article I, Section 9 of the United States Constitution.

53. By disregarding said Stipulation of Fact, the military judge found, incorrectly and unsupported by any competent evidence, that the U.N. patch and cap were justified as "safety" items in a "maneuver" area, such findings lacking "fair support" in the record, or in the alternative, constituting an unreasonable determination of the facts in light of the evidence presented in the court-martial proceedings.

54. Notwithstanding the failure of the military judge to fully and fairly address Plaintiff's claim that the U.N. patches and cap could not be justified as "safety" items in a "maneuver"

area, ACCA and CAAF affirmed the military judge's rulings that the October 1995 orders requiring the wearing of the patches and cap were lawfully authorized.

55. Had full and fair consideration been given to Plaintiff's claim that the U.N. patches and cap could not be justified as "safety" items in a "maneuver" area, the October 1995 orders to wear such patches and cap would have been found violative of Plaintiff's right as an American soldier holding an office of trust of the United States not to be compelled to accept a foreign emolument or office except by consent of Congress as provided for in Article I, Section 9 of the United States Constitution and related statutes and regulations.

56. By the court-martial's, ACCA's and CAAF's failure to fully and fairly address Plaintiff's claim that the order to wear the U.N. patch and cap violated the foreign "emoluments" and "office" prohibition of Article I, Section 9 of the United States Constitution, Plaintiff was denied Due Process of Law and was unlawfully and unconstitutionally convicted and sentenced in violation of Article I, Section 9 of the United States Constitution and related statutes and regulations.

WHEREFORE, Plaintiff Michael G. New prays for a declaratory judgment that his court-martial conviction and sentence to a bad conduct discharge have been obtained in violation of his constitutional rights, and therefore, are null and void, and he prays for injunctive relief directing Defendants and persons acting under their authority: (a) to make appropriate corrections of Plaintiff's military records to vacate and annul the conviction and sentence pursuant to said court-martial; (b) to make provision for restoration of Plaintiff to the rank and seniority to which he was entitled on January 16, 1996; and (c) to grant such additional relief — but not including any monetary damages for loss of back pay and other

benefits incurred as a result of the unconstitutional and unlawful conviction and sentence pursuant to said court-martial and bad conduct discharge — as is deemed just and equitable.

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No. 06-691

In the Supreme Court of the United States

UNITED STATES OF AMERICA
EX REL. MICHAEL G. NEW, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's collateral challenge to his conviction by court-martial for failing to obey a lawful order issued by a member of the armed forces, in violation of Article 92(2) of the Uniform Code of Military Justice, 10 U.S.C. 892(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 448 F.3d 403. The opinion of the district court granting respondents' motion to dismiss (Pet. App. 15a-53a) is reported at 350 F. Supp. 2d 80.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2006. A petition for rehearing was denied on August 17, 2006 (Pet. App. 54a). The petition for a writ of certiorari was filed on November 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At a special court-martial, petitioner was convicted of failing to obey a lawful order issued by a member of the armed forces, in violation of Article 92(2) of the Uniform Code of Military Justice, 10 U.S.C. 892(2). Petitioner was sentenced to a bad-conduct discharge. The Army Court of Criminal Appeals affirmed, 50 M.J. 729 (1999), and the Court of Appeals for the Armed Forces affirmed. Pet. App. 55a-131a. Petitioner then filed a civil action against respondents, the Secretary of Defense and the Secretary of the Army, in the United States District Court for the District of Columbia, challenging his conviction on various grounds. *Id.* at 170a-186a. The district court granted respondents' motion to dismiss for failure to state a claim. *Id.* at 15a-53a. The court of appeals affirmed. *Id.* at 1a-14a.

1. Petitioner was a medic in the United States Army. In 1992, the United Nations established a protective force in the Former Yugoslav Republic of Macedonia. In 1995, petitioner's unit was ordered to deploy to Macedonia as part of the United Nations protective force. In connection with the deployment, members of the unit were ordered to wear various items of United Nations insignia along with their ordinary Army uniforms. Petitioner expressed concerns to his supervisors about the lawfulness of the Army's participation in the mission generally and the lawfulness of the uniform-modification order more specifically. Petitioner's unit was ordered to begin wearing the modified uniform at a battalion formation on October 10, 1995. When petitioner appeared at the battalion formation, he was wearing a uniform without the required United Nations insignia. He was

removed from the formation and subsequently declared non-deployable. Pet. App. 1a-2a, 57a-59a.

2. On October 17, 1995, petitioner was charged before a special court-martial with failing to obey a lawful order issued by a member of the armed forces, in violation of Article 92(2) of the Uniform Code of Military Justice, 10 U.S.C. 892(2). Petitioner moved to dismiss the charge on the grounds, *inter alia*, (1) that the uniform-modification order was unlawful under Army Regulation 670-1, which governs Army uniforms and insignia, and Article I, Section 9, of the Constitution, which prohibits a federal officeholder from accepting an emolument from a foreign government without congressional consent, and (2) that the Army's participation in the peacekeeping mission, and thus the underlying deployment order, were also unlawful. The military judge denied petitioner's motions to dismiss, reasoning that the uniform-modification order was lawful and that petitioner's challenge to the underlying deployment order presented a nonjusticiable political question. After a trial, the court-martial panel found petitioner guilty, and petitioner was sentenced to a bad-conduct discharge. Pet. App. 2a-3a.

3. On appeal, petitioner renewed the arguments from his motions to dismiss and also argued that the military judge erred by deciding the lawfulness of the uniform-modification order, rather than submitting it to the court-martial panel. The Army Court of Criminal Appeals affirmed. 50 M.J. 729 (1999). It held that the military judge correctly concluded that the uniform-modification order was lawful, *id.* at 740; that the military judge correctly concluded that petitioner's challenge to the underlying deployment order presented a nonjusticiable political question, *id.* at 739-740; and that

the military judge properly decided the lawfulness of the uniform-modification order, on the ground that, "[w]hen disobedience of an order is charged, the legality of the order is normally a question of law to be determined by the military judge as an interlocutory matter." *Id.* at 738.

4. The Court of Appeals for the Armed Forces (CAAF) affirmed. Pet. App. 55a-131a.

a. As is relevant here, the CAAF first held that the military judge properly decided the lawfulness of the uniform-modification order, rather than submitting it to the court-martial panel. Pet. App. 63a-76a. The court reasoned that "lawfulness of an order * * * is not a discrete element of an offense under Article 92" but is instead "a question of law" that the military judge could validly decide. *Id.* at 64a. The court explained that "[i]nclusion of the word 'lawful' in Article 92 did not add a separate element to the offense of violating a regulation or order"; rather, it "simply reinforce[d] the opportunity for the accused to challenge the validity of the regulation or order." *Id.* at 73a. "Adjudicating the issue of lawfulness as a question of law for the military judge," the court continued, "ensures that the validity of the regulation or order will be resolved in a manner that provides for consistency of interpretation through appellate review." *Id.* at 74a.

The CAAF then held that the uniform-modification order was lawful. Pet. App. 76a-81a. The court reasoned that "[o]rders are clothed with an inference of lawfulness," *id.* at 77a, and determined that "the evidence presented by [petitioner] did not overcome the presumption of lawfulness." *Ibid.* The court explained that "it is difficult to think of a requirement more necessary to promoting the basic [peacekeeping] mission or to

safeguarding discipline and morale of deployed troops than uniform requirements." *Id.* at 80a.

Finally, the CAAF held that petitioner's challenge to the underlying deployment order presented a nonjusticiable political question. Pet. App. 81a-83a. The CAAF reasoned that "[c]ourts have consistently refused to consider the issue of the President's use of the Armed Forces." *Id.* at 82a.

b. Judge Effron concurred. Pet. App. 84a-94a. While he agreed that the military judge was not required to "submit the issue of legality to the [panel] members as an essential element of the offense," *id.* at 85a, he suggested that the Manual for Courts-Martial should "provide more detailed guidance as to the appropriate means by which the legality of an order should be raised and adjudicated in a court-martial." *Id.* at 88a.

c. Judge Sullivan concurred in the result. Pet. App. 94a-126a. He concluded that the military judge had erred by deciding the lawfulness of the uniform-modification order because the lawfulness of the order constituted "an element of the crime which is a mixed question of fact and law." *Id.* at 115a. He reasoned that this case was therefore analogous to *United States* v. *Gaudin*, 515 U.S. 506 (1995), in which the Court held that the materiality of a fact contained in a false statement should be submitted to the jury in a prosecution under 18 U.S.C. 1001. Pet. App. 115a-121a. Judge Sullivan concluded, however, that any error in failing to submit the lawfulness of the order to the court-martial panel was harmless because "it was uncontroverted in [petitioner's] case that he was ordered to wear the UN badges and cap pertinent to the official deployment of his unit to Macedonia as part of a peacekeeping mission"; "[i]t was also uncontroverted that the order to wear these badges was

given by his commanders as part of the operations plans for the mission and for safety purposes"; and petitioner "proffered no [contrary] evidence." *Id.* at 124a-125a.

d. Judge Everett concurred in part and concurred in the result. Pet. App. 126a-131a. He reasoned that the political question doctrine precluded petitioner's challenge to the lawfulness of the deployment order, *id.* at 129a, and that any question of fact relating to the lawfulness of the uniform-modification order was "so insubstantial that the judge's failure to instruct thereon was not reversible error." *Id.* at 131a.

5. This Court denied review of the CAAF's decision. 534 U.S. 955 (2001).

6. Petitioner filed a civil action against respondents in the United States District Court for the District of Columbia, which, as amended, challenged his conviction on various grounds. In that action, petitioner claimed that he was denied due process because (1) the military judge, rather than the court-martial panel, decided the lawfulness of the uniform-modification order; (2) the military judge held that the legality of the underlying deployment order presented a nonjusticiable political question; (3) the military courts should have more fully considered his claim that the uniform-modification order violated Article I, Section 9, of the United States Constitution; and (4) the military judge erred by determining that the items of United Nations insignia were justified under Army Regulation 670-1. Pet. App. 22a-23a, 170a-186a.

Treating the action as a petition for habeas corpus under 28 U.S.C. 2241, the district court granted respondents' motion to dismiss for failure to state a claim. Pet. App. 15a-53a. As a preliminary matter, the court reasoned that, while it could consider constitutional as well

as non-constitutional claims on collateral review of a military conviction, it would "afford substantial deference to the military courts in their application of military law." *Id.* at 31a.

On the merits of petitioner's claims, the district court first rejected petitioner's claim that the military judge erred by deciding the lawfulness of the uniform-modification order. Pet. App. 32a-34a. The court reasoned that, "[t]o the extent that a right to jury trial exists in this context, it is a creation of the Uniform Code of Military Justice, not the United States Constitution," *id.* at 33a (footnote omitted), and that petitioner's claim involved "rather specialized questions of military law on which the Court defers to the military courts." *Id.* at 34a. The court then rejected petitioner's challenge to the deployment order. *Id.* at 34a-50a. The court reasoned that each of petitioner's bases for challenging the order either implicated a nonjusticiable political question or lacked merit. *Id.* at 40a-50a. Finally, the court rejected petitioner's challenges to the uniform-modification order. *Id.* at 50a-52a. With regard to petitioner's claim under Article I, Section 9, of the Constitution, the court reasoned that the claim "was extensively litigated at trial" and "raised and rejected on appeal," *id.* at 51a; that "[p]etitioner has offered (and there appears to be) no Supreme Court precedent defining the scope and application of [Section 9]," *ibid.*; and that, "[i]n any event, in the judgment of this Court[,] the uniform order does not violate the plain language" of that provision. *Id.* at 52a n.16. With regard to petitioner's claim under Army Regulation 670-1, the court reasoned that "[p]etitioner in essence asks this Court to re-weigh the evidence presented to the trial judge," Pet. App. 51a; that "[t]he military judge found petitioner's fundamental

proffer insufficient to rebut the presumption of lawfulness that attaches to military orders," *ibid.*; and that "it is not for this Court to disturb that finding." *Ibid.*

7. The court of appeals affirmed. Pet. App. 1a-14a.

a. As a preliminary matter, the court of appeals determined that jurisdiction rested not on the habeas statute, 28 U.S.C. 2241, but on the general federal-question statute, 28 U.S.C. 1331, because petitioner was not in custody. Pet. App. 4a. The court explained that, in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), this Court had suggested that, although there was federal jurisdiction over a collateral challenge to a military conviction even in the absence of custody, collateral review was available only to challenge "fundamental" defects that rendered the conviction "void." Pet. App. 4a. The court reasoned that this standard of review was "more deferential than habeas review of military judgments," which was itself at least as deferential as habeas review of state-court judgments. *Id.* at 5a. The court noted that, in *Burns* v. *Wilson*, 346 U.S. 137 (1953), a plurality of this Court had suggested that the relevant inquiry, in conducting habeas review of military judgments, was whether the military had given "fair consideration" to each of the habeas petitioner's claims. Pet. App. 5a. The court indicated that it was unclear whether, in light of the fact that state-court judgments are entitled to greater deference on habeas review now than they were at the time of *Burns*, military judgments should be entitled to greater deference as well. *Id.* at 6a-7a. The court added, however, that "we have serious doubt whether the judicial mind is really capable of applying the sort of fine gradations in deference that the varying formulae may indicate." *Id.* at 7a. "It suffices for our purposes," the court concluded, "to repeat *Councilman*'s

statement that errors must be fundamental to void a court-martial judgment on collateral review." *Ibid.*

b. The court of appeals proceeded to hold that, under a deferential standard of review, all of petitioner's claims lacked merit. Pet. App. 7a-14a.

The court of appeals first rejected petitioner's claim that the military judge erred by deciding the lawfulness of the uniform-modification order. Pet. App. 7a-9a. The court noted that petitioner could invoke only the Due Process Clause to support that claim, because the right to a jury trial under the Sixth Amendment is inapplicable in a court-martial. *Id.* at 7a. The court additionally noted that it was only "by virtue of a *statute*" that "any element of the offense must be submitted to the military jury for evaluation under the reasonable doubt standard." *Id.* at 8a (citing 10 U.S.C. 851(c)). Whatever the source of the right on which petitioner relied, the court reasoned that "[i]dentifying the elements of a statutory provision defining a crime is an exercise in statutory interpretation," *ibid.*, and concluded that there was "no fundamental defect in the [CAAF's] conclusion that the lawfulness of an order is not a separate and distinct element of the offense." *Ibid.*

The court of appeals next rejected petitioner's challenges to the uniform-modification order. Pet. App. 9a-11a. With regard to petitioner's claim under Army Regulation 670-1, the court reasoned that petitioner had "acknowledge[d] the presumption of lawfulness that attaches to military orders" but "did not proffer any evidence" to overcome that presumption. Pet. App. 10a. The court noted that Judge Sullivan, who had disagreed with the CAAF majority on whether the military judge could decide the lawfulness of the uniform-modification order, had concluded that any error was harmless be-

cause the commanders had "indisputably" issued the order for mission-related and safety purposes. *Ibid.* The court therefore concluded that it "c[ould] find no fundamental defect in the [CAAF's] consideration of the issue." *Id.* at 11a. With regard to petitioner's claim under Article I, Section 9, of the Constitution, the court noted that petitioner "offer[ed] no legal analysis" supporting his claim, and that the claim was "a stretch at best." Pet. App 11a. For that reason, the court concluded, the military judge did not err by disposing of that claim summarily. *Ibid.*

Finally, the court of appeals rejected petitioner's challenge to the deployment order. Pet. App. 11a-14a. The court stated that "the military courts' use of the political question doctrine deserves deference." *Id.* at 12a. The court reasoned that, regardless whether petitioner's claims would be barred by the political question doctrine in an ordinary civil suit, "the military justice context compels a somewhat broader doctrine in light of the implications of any alternative view." *Id.* at 13a. The court explained that a contrary holding would allow a soldier to invoke "a self-help remedy of disobedience" and to use a court-martial as "a vehicle for altering the traditional relationship between the armed forces and the civilian policy making branches of government." *Ibid.* (citation omitted). "Given the threat to military discipline," the court concluded, "we have no difficulty accepting the military courts' reliance on the [political question] doctrine." *Id.* at 14a.

ARGUMENT

Petitioner contends (Pet. 11-20) that the court of appeals applied an erroneous standard of review to claims raised in a collateral federal-court challenge to a convic-

tion by court-martial. Petitioner also contends (Pet. 20-30) that the military judge deprived him of due process by deciding the lawfulness of the uniform-modification order, rather than submitting that issue to the court-martial panel, and by holding that the lawfulness of the deployment order presented a nonjusticiable political question. None of those contentions warrants further review.

1. This Court's most relevant decision on the standard of review for claims raised in a collateral challenge to a conviction by court-martial is *Burns* v. *Wilson*, 346 U.S. 137 (1953). In *Burns*, this Court affirmed the dismissal of petitions for habeas corpus filed by two military prisoners convicted by courts-martial of murder and rape. In a plurality opinion, four members of the Court concluded that, on habeas review of military judgments, the appropriate inquiry was "whether the military have given fair consideration to each of [petitioner's] claims." *Id.* at 144. Because the military courts had "heard petitioners out on every significant allegation which they now urge," the plurality concluded that "[p]etitioners ha[d] failed to show that this military review was legally inadequate." *Id.* at 144, 146. By contrast, the plurality reasoned, a district court could review claims de novo where the underlying allegations were "sufficient to depict fundamental unfairness" and "the military courts [had] manifestly refused to consider those claims." *Id.* at 142. Justice Minton concurred in the judgment, reasoning that the sole function of a court conducting habeas review was "to see that the military court ha[d] jurisdiction, not whether it ha[d] committed error in the exercise of that jurisdiction." *Id.* at 147. Justice Jackson concurred in the result without opinion. *Id.* at 146.

As one court of appeals recently noted, since this Court's decision in *Burns*, "[t]he degree to which a federal habeas court may consider claims of errors committed in a military trial has * * * been the subject of controversy and remains unclear." *Brosius* v. *Warden, U.S. Penitentiary*, 278 F.3d 239, 242 (3d Cir.) (Alito, J.), cert. denied, 537 U.S. 947 (2002). Although the courts of appeals have articulated the standard of review for claims raised in a habeas petition in different ways, however, they have been in broad agreement on two principles. First, the courts of appeals have generally held that, where the claims at issue have already been considered by the military courts, only claims involving fundamental or substantial constitutional errors are cognizable on collateral review. See, *e.g.*, *Bowling* v. *United States*, 713 F.2d 1558, 1561 (Fed. Cir. 1983) (explaining that "the constitutional claims made must be serious ones" and "demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process"); *Calley* v. *Callaway*, 519 F.2d 184, 199 (5th Cir. 1975) (stating that "[t]he asserted error must be of substantial constitutional dimension"). Second, the courts of appeals have generally held that, even with regard to such constitutional claims, the decisions of the military courts are entitled to at least some degree of deference. See, *e.g.*, *Brosius*, 278 F.3d at 245 (stating that "our inquiry in a military habeas case may not go further than our inquiry in a state habeas case" and assuming, for the sake of argument, that the deferential standard of 28 U.S.C. 2254(d) was applicable to the substantive determinations of military courts); *Kauffman* v. *Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969) (explaining that "the test of fairness requires that military rulings

on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule").

Insofar as the courts of appeals have articulated different formulations of the standard of review for collateral challenges to convictions by courts-martial, this case would constitute a poor vehicle in which to address those inconsistencies, because it presents an additional complication: *viz.*, that, because petitioner is not in custody, jurisdiction rests not on the habeas statute, 28 U.S.C. 2241, but on the general federal-question statute, 28 U.S.C. 1331. See Pet. App. 4a. In this case, the court of appeals suggested that the standard of review in a collateral challenge under 28 U.S.C. 1331 was "more deferential" than the standard of review on habeas, Pet. App. 5a, though it ultimately concluded only that "errors must be fundamental to void a court-martial judgment on collateral review." *Id.* at 7a. As the court of appeals noted (*id.* at 5a), moreover, this Court's decision in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), seemingly supports the proposition that the standard of review in collateral challenges under Section 1331 should be more deferential. See *id.* at 753 (noting that "grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief"). Although petitioner and his amicus cite various cases (including *Kauffman*) in which lower courts have applied the same standard of review in collateral challenges under Section 1331 as on habeas, they do not identify any case (other than this one) that has even discussed, much less rejected, the argument that the standards should be different. To the extent that the Court wishes to clarify the standard of review for collateral challenges to convictions by courts-martial,

therefore, it should either do so in a case in which the defendant is proceeding under the habeas statute, or await further percolation on the applicable standard of review in a collateral challenge under Section 1331.

2. In any event, even assuming, *arguendo*, that the courts of appeals' differing formulations of the standard of review for collateral challenges to convictions by courts-martial would lead to different results in any given case, this case would constitute a poor vehicle for addressing the issue for the additional reason that, under any plausible formulation of the applicable standard, petitioner would not prevail on either of the underlying claims that he continues to advance.[1] All of the numerous courts to have considered those claims (or variations of them) have rejected them, and this Court denied certiorari on those claims on direct review. See Pet. at 14-19, 21-29, *New* v. *United States*, cert. denied, 534 U.S. 955 (2001) (No. 01-425).

a. Petitioner first contends (Pet. 22-27) that the court of appeals erred by rejecting his claim that the military judge violated his right to due process by failing to submit the lawfulness of the uniform-modification order to the court-martial panel, on the ground that the lawfulness of the order is an element of the underlying offense of failing to obey a lawful order issued by a member of the armed forces. See 10 U.S.C. 892(2). That claim lacks merit and does not independently warrant review.

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[1] Before this Court, petitioner has apparently abandoned his claims that he was denied due process because the military courts should have more fully considered his claim that the uniform-modification order violated Article I, Section 9, of the United States Constitution, and because the military judge erred by determining that the items of United Nations insignia were justified under Army Regulation 670-1.

The Due Process Clause requires that, in a criminal prosecution, the government "pro[ve] beyond a reasonable doubt * * * every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Even assuming that the lawfulness of the order is an element of the offense of failing to obey a lawful order issued by a member of the armed forces, petitioner does not support his assertion (Pet. 23-25) that the military judge failed to apply the reasonable-doubt standard in determining that the uniform-modification order was lawful. Indeed, he appears to have made "no real contest" on any factual issue relevant to the lawfulness of the order. See Pet. App. 125a.[2] Apart from the standard-of-proof question, to the extent that petitioner claims that the court-martial panel (which serves as the military equivalent of a civilian jury), and not the military judge, should have evaluated the lawfulness of the order, see *id.* at 181a (contending, in the relevant count of the complaint, that the CAAF erred by ruling that "lawfulness was not an element of the offense * * * and therefore[] not an issue for the military jury"), his claim is not of constitutional dimension.

As petitioner concedes (Pet. 8, 26), the Sixth Amendment does not confer the right to a jury in a court-martial proceeding. See, *e.g.*, *Ex parte Quirin*, 317 U.S. 1,

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[2] Although petitioner contends (Pet. 24) that "the CAAF majority imposed the burden of proving the unlawfulness of the order" upon him, the cited portion of the CAAF's opinion stands only for the proposition that a military order is presumed to be lawful. See Pet. App. 80a. Elsewhere in his petition, petitioner seemingly concedes the applicability of that presumption in courts-martial, at least as a general matter. See Pet. 27 (noting that, "[i]n a court-martial for disobedience of a lawful order, a military order is presumed to be lawful").

39 (1942). Accordingly, petitioner does not ground his claim on the Sixth Amendment, but instead seemingly grounds his claim on Article 51(c) of the Uniform Code of Military Justice, 10 U.S.C. 851(c), which provides that the military judge should submit all of the elements of the offense to the members of the court-martial panel. Petitioner cannot contend, however, that a violation of Article 51(c) involves the kind of fundamental unfairness that implicates the *Fifth Amendment* guarantee of due process—especially in light of the more limited role that the Due Process Clause plays in the military justice system. See, *e.g.*, *Weiss* v. *United States*, 510 U.S. 163, 176-178 (1994). Even assuming that the lawfulness of the order is an element of the offense that should have been submitted to the court-martial panel under Article 51(c), therefore, petitioner has failed to state a valid due process claim—and his non-constitutional claim, which petitioner advanced on direct review, would not be cognizable on collateral review. See, *e.g.*, *Bowling*, 713 F.2d at 1562; *Calley*, 519 F.2d at 199.

In any event, the military courts did not err by concluding that the lawfulness of the order did not constitute an element of the underlying offense of failing to obey a lawful order issued by a member of the armed forces. The better view is that, as the term suggests, the "lawfulness" of an order should be treated as a question of law that need not be submitted to the court-martial panel under Article 51(c), rather than as a mixed question of law and fact (like the materiality of a fact contained in a false statement in a prosecution under 18 U.S.C. 1001). See *United States* v. *Gaudin*, 515 U.S. 506, 511-515 (1995). As the CAAF noted, if a contrary rule were applied, "the validity of regulations and orders of critical import to the national security would be sub-

ject to unreviewable and potentially inconsistent treatment by different court-martial panels." Pet. App. 74a. Moreover, as Judge Sullivan concluded in his concurring opinion, even if the military judge had erred by failing to submit the lawfulness of the uniform-modification order to the court-martial panel (or by applying something less than the reasonable-doubt standard), any error was harmless, because petitioner made no factual showing relevant to the ultimate question whether the order was invalid under Army Regulation 670-1. See Pet. App. 124a-125a.

b. Petitioner next contends (Pet. 27-30) that the court of appeals erred by rejecting his claim that the military judge violated his right to due process by holding that the legality of the underlying deployment order presented a nonjusticiable political question. That claim also lacks merit and does not independently warrant review.

In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court enumerated six factors, any one of which would render a case nonjusticiable under the political question doctrine:

> [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potential-

> ity of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. At least two of those factors—"an unusual need for unquestioning adherence to a political decision already made" and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"—would render some, and arguably all, of petitioner's challenges to the deployment order nonjusticiable under the political question doctrine even in an ordinary civil action. *Ibid.* Moreover, as the court of appeals noted, even assuming that some of petitioner's challenges would be justiciable in a civil action, "the military justice context compels a somewhat broader [political question] doctrine in light of the implications of any alternative view." Pet. App. 13a. As Judge Effron explained in his concurring opinion on direct review (and as the court of appeals reiterated), were it the case that a member of the military could disobey a *deployment* order and subsequently challenge the validity of that order before a court-martial, it would effectively transform court-martial proceedings into "a vehicle for altering the traditional relationship between the armed forces and the civilian policy making branches of government." *Id.* at 13a, 84a; see *In re Grimley*, 137 U.S. 147, 153 (1890) (noting that "[n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier"). Petitioner cites no authority for the proposition that a member of the military can challenge the validity of a deployment order in such a manner.

In any event, petitioner does not merely contend that the military judge erred by prohibiting him from challenging the underlying *deployment* order under the political question doctrine, but instead contends that, in so

doing, the military judge deprived him of his ability to present a complete defense (and therefore violated his right to due process). See, *e.g.*, Pet. 29, 30. Petitioner, however, was fully able to challenge the validity of the *uniform-modification* order, the disobeyance of which was the subject of the immediate charge against him. The military judge considered petitioner's challenges to that order and ultimately concluded that the uniform-modification order was lawful. See Pet. App. 3a. Particularly in light of the more limited role that the Due Process Clause plays in the military justice system, see, *e.g.*, *Weiss*, 510 U.S. at 176-178, the application of the political question doctrine to prohibit petitioner from challenging the validity of the underlying *deployment* order constituted a reasonable restriction on the scope of petitioner's defense and thus did not offend due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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No. 06-691

IN THE

Supreme Court of the United States

UNITED STATES *EX REL.* MICHAEL G. NEW,

Petitioner,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, *ET AL.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Contrary to the Government's argument that this case would be a "poor vehicle" to address the questions presented by Michael New's Petition ("Pet."),[1] just the opposite is true. New's Petition presents to the Court a unique opportunity to resolve existing conflicts and confusion prevailing in the federal courts for over five decades over the proper standard of review to be applied to collateral attacks on courts-martial convictions in a case of critical importance to the administration of military justice.

1. Contrary to the Government's Assertion, This Case Is Appropriate for Review.

According to the Government, the conflict among the circuits over the standard of review governing collateral attacks on courts-martial convictions has matured sufficiently for review by this Court in **habeas** collateral attacks, but that conflict has not yet emerged in **non-habeas** attacks, such as presented by New's petition. Resp. Br., pp. 13-14. However, it is precisely because New was not found to be "in custody" that this case presents a unique opportunity for this Court to clarify the standard of review in both kinds of cases. On the one hand, if the Court were to hold that the **same** standard of review applies in both habeas and non-habeas collateral attacks, it would need to clarify that standard. On the other hand, if the Court were to hold that a **different** standard of review applies in non-habeas collateral attacks, it would still be necessary to articulate that standard and clarify how it differs from the habeas standard, an analysis that would necessarily entail clarifying the Burns v. Wilson "full and fair consideration" test.

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[1] *See* Brief for the Respondents in Opposition ("Resp. Br. "), pp. 13-14.

In either event, the Court should grant certiorari to clarify the standard of review that applies in non-habeas collateral attacks. Contrary to the Government's equivocal assertion, this Court's decision in Schlesinger v. Councilman, 420 U.S. 738 (1975), does not "**seemingly support[]** the proposition that the standard of review in collateral challenges under [28 U.S.C.] Section 1331 should be more deferential" than challenges cognizable under 28 U.S.C. Section 2241. Resp. Br., p. 13 (emphasis added). Nowhere in that case did the Court indicate that the "fundamental defect" test was intended to establish a different, more deferential standard of review in non-habeas collateral attacks. Indeed, in Councilman, this Court observed that both non-habeas cases, and "habeas cases, demonstrate a **uniform** approach to the problem of collateral relief from the consequences of court-martial judgments." *Id.*, 420 U.S. at 748 (emphasis added). Further, as pointed out by New's Petition and the National Institute of Military Justice's *amicus* brief ("NIMJ Br."), the Councilman case did not involve a collateral attack on a court-martial conviction and thus did not even address what the standard of review should be in a non-habeas case. *See* Pet., p. 16. *See also* NIMJ Br., pp. 15-20.

Finally, the Government has contended that the standard of review issue raised in this case should "await further percolation," because there supposedly is no "case (other than this one) that has even discussed, much less rejected, the argument that the standards should be different." *See* Resp. Br., pp. 13-14. This effort to isolate this case into a class of one should be rejected because the court of appeals below, like all of the other courts that have dealt with a non-habeas collateral attack, wrestled with the Burns "full and fair consideration" formula before setting its standard of review. *See* U.S. *ex rel.* New v. Rumsfeld, 448 F.3d 403, 407-08 (D.C. Cir. 2006); Pet., pp. 5a-7a. The major difference between this case and the other non-habeas cases is that no other court has

gone so far in a non-habeas case as to water down the Burns standard, the other courts having applied that standard without discriminating between the two types of collateral attacks. *See, e.g.*, Bowling v. United States, 552 F. Supp. 54, 56-57 (Cl. Ct. 1982). Indeed, prior to this case, the "governing precedent" in the District of Columbia Circuit was Kauffman v. Secretary of the Air Force, 415 F.2d 991, 995, *cert. denied*, 396 U.S. 1013 (1970),[2] which had applied a far more stringent standard of review in a non-habeas collateral attack, fashioned from the Burns v. Wilson standard of "full and fair consideration"[3] developed by this Court in a habeas collateral attack.[4] By its radical and unexplained departure from Kauffman, the court below has brought the conflict and confusion over the standard of review to a culmination point. American servicemembers would not be well-served by another 50 years of "percolation." *See* Pet., pp. 16-18; NIMJ Br., pp. 2-4.

2. Contrary to the Government's Assertion, There Is No "Broad Agreement" Among the Circuits on the Standard of Review.

In an attempt to minimize the conflicting interpretations and applications of the Burns test, the Government claims that the courts of appeal are in "broad agreement on two principles," namely: (1) that "only claims involving fundamental or substantial constitutional errors are cognizable on collateral review"; and (2) that "the decisions of the military courts are entitled to at least some degree of deference." Resp. Br., p. 12.

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[2] *See* U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 89 (D.D.C. 2004). Pet., p. 26a.

[3] *See* Kauffman, 415 F.2d at 996-97.

[4] *See* Burns, 346 U.S. at 139.

That argument is factually incorrect, and in any event does not obviate the need for review.

First, there is **no** consensus in the courts of appeal that "**only** claims involving fundamental or substantial errors are cognizable on collateral review." Most recently, the Third Circuit applied the standard of review set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 (2000), to a habeas petition brought by a military prisoner. Brosius v. Warden, 278 F.3d 239 (3d Cir. 2002). Under that standard, claims that a court-martial conviction was obtained "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," are cognizable, as are claims that a decision was based on an "unreasonable determination of the facts." *Id.*, 278 F.3d at 245. *See* NIMJ Br., pp. 10-11, 13. Additionally, the Fifth and Tenth Circuits have adopted the Calley test, which expressly embraces review of a court-martial conviction on a **nonconstitutional** ground where "**exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice**." Calley v. Callaway, 519 F.2d 184, 203 (5th Cir. 1975) (emphasis added). *Accord*, Cothran v. Dalton, 83 F. Supp. 2d 58, 66 (D.D.C. 1999).

Second, the existence of a consensus that "the decisions of the military courts are entitled to at least **some** degree of deference," as the Government has contended, offers no judicial standard at all, as vividly illustrated by this very case. The court of appeals below ruled "that non-habeas review is if anything **more deferential** than habeas review of military judgments," but did not articulate what that standard of deference should be, having "serious doubt whether the judicial mind really is capable of applying the sort of fine gradations of deference that the **varying formulae** may indicate." U.S. *ex*

rel. New v. Rumsfeld, 448 F.3d at 408; Pet., p. 7a. (emphasis added). Ironically, the Government's assertion that there is a consensus on the degree of deference to be accorded military courts rests upon Brosius, a habeas case, and Kauffman, a non-habeas case.[5] But this contradicts the ruling below that the degree of deference differs in the two kinds of cases — a ruling which, by its Brief in Opposition, the Government now seeks to uphold.

In short, the Government has strained at a gnat, hoping that this Court will swallow a camel. On the one hand, it asserts "broad agreement"[6] among the circuits and, on the other, admits that there are "inconsistencies" in the "different formulations of the standard of review for collateral challenges to convictions by courts-martial."[7] This difference, however, arises not because some of those challenges are cognizable under "the habeas statute," and others under the "general federal-question statute," but because Burns has engendered the conflict and confusion in whatever type of case it has been applied. *See* Pet., pp. 11-16; NIMJ Br., pp. 8-11.

3. Contrary to the Government's Argument, New's Claims Are Cognizable in a Collateral Attack on His Court-Martial Conviction.

The Government contends "that under any plausible formulation of the applicable standard, petitioner would not prevail on either of the underlying claims that he continues to advance." Resp. Br., p. 14. However, not only has the

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[5] *See* Resp. Br., p. 12.

[6] *See id.*

[7] *See id.*, p. 13.

Government failed to articulate that "plausible" standard, but it has proposed a disputed standard of review by which it then purports to assess the adequacy of New's collateral attack.

The Government asserts that New's claim that he was denied due process by the military court's ruling — that the lawfulness of the uniform-modification order need not be proved beyond a reasonable doubt — "is not of constitutional dimension," but only a matter of statutory interpretation and, therefore, "not ... cognizable on collateral review." Resp. Br., pp. 15-16. Citing Bowling, 713 F.2d at 1562, and Calley, 519 F.2d at 199, the Government has assumed that any "plausible" standard of review would foreclose any review of a claimed error in statutory interpretation, no matter how egregious that error may have been. But the Calley standard squarely contradicts the Government's position.

As Judge Friedman — the district court judge before whom New's Petition was initially presented — has already pointed out, the Calley court stated:

> "Most habeas corpus cases have provided relief only where it has been established that errors of constitutional dimension have occurred. But the Supreme Court **held** in a recent decision that **nonconstitutional errors of law** can be raised in habeas corpus proceedings where 'the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice,"' and when the alleged error of law 'presented exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" *Davis v. United States*, 417 U.S. 333, 346 ... (1974), quoting *Hill v. United States*, 368 U.S. 424, 428 ... (1962). Thus, an essential

> prerequisite of any court-martial error we are asked to review is that it present a substantial claim of constitutional dimension *or* that **the error be so fundamental as to have resulted in a gross miscarriage of justice**. *Calley v. Callaway* ... [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 91 (D.D.C. 2004), Pet., pp. 29a-30a. (italics original) (bold added).]

Moreover, Judge Friedman went out of his way to remind the Government that "[a]t oral argument, [the Government] **incorrectly** interpreted" Cothran v. Dalton, 83 F. Supp. 2d 58 (D.D.C. 1999), "as limiting collateral review to fundamental constitutional errors":

> But consistent with *Davis* v. *United States*, 417 U.S. 333 ... (1974), Judge Flannery actually held in Cothran that *any* constitutional or jurisdictional error is subject to review on collateral attack, **while statutory claims are subject to such review only if they are so fundamental as to render the court-martial proceeding unfair....** [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d at 91 n.6; Pet., p. 30a (italics original) (bold added).]

Additionally, the AEDPA standard applied in Brosius would permit a collateral attack based upon a claim that a court-martial conviction was obtained "contrary to, or involv[ing] an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Brosius, 278 F.3d at 245.

Thus, under either the Calley or the Brosius standards, New has clearly alleged a cognizable claim in Count 1 of his complaint. *See* Second Amended Complaint for Declaratory

Judgment, Injunctive Relief and an Order in the Nature of a Writ of Mandamus Amending Petition for Writ of Habeas Corpus ("Compl.") ¶¶ 40-41; Pet., p. 181a.

4. Contrary to the Government's Argument, New's Due Process Claims Are Meritorious and of Substantial Constitutional Dimension.

Although the Government has acknowledged that this Court has ruled that, **"in a criminal case"** the Due Process Clause requires the prosecution to "'pro[ve] beyond a reasonable doubt ... every fact necessary to constitute the crime with which [the defendant] is charged,"[5] the Government has contended that this standard does not apply to a court-martial "in light of the more limited role that the Due Process Clause plays in the military justice system," citing Weiss v. United States, 510 U.S. 163, 176-78 (1994). Resp. Br., p. 16. But Weiss involved a due process claim **challenging** the constitutionality of a clearly established **congressional policy** to which "courts 'must give particular deference to [in light of] Congress['s] ... authority to regulate the land and naval forces.'" *Id.*, 510 U.S. at 177. In contrast, New's due process claims do **not** challenge congressional policy. Rather, those claims **rest on constitutional norms** embodied in statutory provisions governing court-martial practice and procedure, and in statutory provisions limiting the president's authority to deploy American armed forces in the service of the United Nations, all of which were enacted by Congress in pursuance of its authority to "make Rules for the Government and Regulation of the land and naval forces." *See* Pet., pp. 22-29.

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[5] *See* Resp. Br., p. 15 (emphasis added).

With respect to New's claim that he was denied due process of law by the court-martial ruling that "lawfulness" was not an element of the offense charged, the military courts misconstrued an offense **defined by Congress** in 18 U.S.C. Section 892(2), in disregard of the "rule of [statutory] construction ... in Neder v. United States, 527 U.S. 1 (1999)." *See* Compl. ¶ 40, Pet., p. 181a. Further, New has claimed that, by eliminating the order's "lawfulness" as an element of the offense — consigning it as an issue of law for the judge, rather than a mixed question of law and fact for the military jury — the military courts have "evaded" the due process requirement of proof of every element of an offense beyond a reasonable doubt, embraced by Congress in 18 U.S.C. Section 851(c). *See* Compl. ¶¶ 19, 30; Pet., pp. 177a, 179a. As the Navy-Marine Corps Court of Criminal Appeals stated in United States v. Myers, 51 M.J. 570 (N.M.C.C.A. 1999), "the Due Process Clause of the Constitution requires the prosecution to prove each and every element of every offense alleged against an accused by legal and competent evidence beyond a reasonable doubt." *Id.*, 51 M.J. at 578. Yet, in New's case — in violation of this due process principle — the uniform-modification order was justified not by the introduction of any evidence, but solely by the contradictory and unsupported arguments of the prosecutor. *See* Compl. ¶¶ 15, 17, 19, 23; Pet., pp. 175a-178a. As Judge Sullivan of the United States Court of Appeals for the Armed Forces ("CAAF") observed, in so doing, New's court-martial represented a "**radical departure** from our political, legal and military tradition."[9] United States v. New, 55 M.J. 95, 115 (2001) (Sullivan, J., concurring) (emphasis added).

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[9] *See, e.g.*, Judge Sullivan's analysis of the text of 18 U.S.C. § 892(2), treatises, courts-martial manuals, and cases establishing "lawfulness" as an element of the offense alleged in the charge against New. United States v. New, 55 M.J. 95, 120-22 (2001); Pet., pp. 108a-115a.

Although the Government disputes New's claim that he was denied due process by the misuse of this Court's political question doctrine, it ignores the fact that New's challenge to the legality of the Macedonian deployment was primarily based upon explicit statutory grounds, supported by expert testimony that the Macedonian deployment violated the United Nations Participation Act. Yet, the military courts refused to address the merits of this statutory claim, indiscriminately sweeping it aside as a nonjusticiable political question.

The Government's response blithely claims that using "the political question doctrine to prohibit [New] from challenging the validity of the underlying *deployment* order constituted a reasonable restriction on the scope of [New's] defense and thus did not offend due process." Resp. Br., p. 19. In reality, however, the military courts denied New his fundamental right to a fair trial, having deprived him of any meaningful opportunity to contest the legality of the ordered Macedonian deployment,[10] while allowing the prosecution to rely upon the supposed legality of that same deployment to justify what, as CAAF Judge Sullivan observed, would otherwise have been a "patently illegal" order. *See* United States v. New, 55 M.J. at 127.

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[10] *See* Compl. ¶¶ 9, 12, 16, 26, 27, 44; Pet., pp. 172a-176a, 178a-179a, 182a. *See also* Pet., pp. 27-30.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES EX REL. MICHAEL G. NEW,
Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, AND FRANCIS J. HARVEY, SECRETARY OF THE ARMY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus is a non-profit corporation dedicated to advancing the fair administration of military justice, and will address the following questions:

1. What is the proper standard of review applicable to collateral attacks on court-martial convictions?

2. Does a more deferential standard of review apply to collateral attacks on military convictions where the defendant is not, or is no longer, in custody?

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BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Institute Of Military Justice (NIMJ) is a District of Columbia non-profit corporation dedicated to advancing the fair administration and public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and appeared before this Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

NIMJ is actively involved in public education through its website, www.nimj.org, and its numerous publications.

SUMMARY OF ARGUMENT

This case involves the D.C. Circuit's rejection of a former United States servicemember's non-habeas collateral attack on his court-martial conviction. In this brief, NIMJ will address two issues of profound consequence for the relations between the civilian and military court systems, as well as the members of the United States armed forces: (1) what is the proper standard of review applicable to collateral attacks on court-martial convictions, and, relatedly, (2) whether a more deferential standard of review applies where the de-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties have been filed with the Clerk. Pursuant to Rule 37.6, NIMJ states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than NIMJ or its counsel made a monetary contribution to the preparation or submission of this brief.

fendant is not or is no longer in custody. The Court should grant certiorari in order to resolve these timely and important issues, which are here uniquely intertwined.

As Judge Sullivan put it in his opinion concurring in the underlying judgment of the Court of Appeals for the Armed Forces (CAAF), "The instant case is ultimately about the process due an American servicemember on trial for the crime of disobedience of a lawful order, *i.e.*, how the lawfulness of the disobeyed order is to be determined at a court-martial and whether that procedure is constitutional." *United States v. New*, 55 M.J. 95, 115 (C.A.A.F. 2001) (Sullivan, J., concurring in the result), Pet. App. 96a. The standard by which Article III courts are to review collateral attacks on the military courts' determinations of such issues is of vital importance and has long been the subject of widespread confusion among the circuits.

Over fifty years ago in the landmark case of *Burns v. Wilson*, 346 U.S. 137 (1953), a plurality of this Court held that Article III courts must review collateral attacks on court-martial convictions to determine whether the court-martial tribunal gave "full[] and fair[]" consideration to the petitioner's claims. *Id.* at 143. That articulated standard has been the source of widespread confusion among the lower courts ever since. *See, e.g., Brosius v. Warden*, 278 F.3d 239, 242 (3d Cir. 2002) (Alito, J.) ("The degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear."). Indeed, the *Burns* test has proven unusually difficult for courts to understand and apply in a principled fashion, and has been variously characterized as "mean[ing] many things to many courts," *Kauffman v. Sec'y of Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969), "anything but clear," *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990), "somewhat hazy," *Swisher v. United States*, 354 F.2d 472, 475 (8th Cir. 1966), and the source of "considerable confusion." *Allen v. Van Cantfort*, 436 F.2d 625, 629 (1st Cir. 1971). Commentators have been even more critical, one calling the *Burns* standard "a facile phrase, easy to state, but

difficult to define and to apply[.]"[2] And, from the very beginning, at least one member of this Court deemed the *Burns* test "inconclusive" and based on an understanding of the "traditional scope of inquiry" that was "demonstrably incorrect," as well as a conception of the relationship between this Court and military law that "disregards both history and the statute books." *Burns*, 346 U.S. at 844-46, 849 n.1 (Frankfurter, J., dissenting from denial of rehearing).

It is unsurprising, then, that the circuits have given the *Burns* "full and fair consideration" standard significantly divergent interpretations. *Compare Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986) ("When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion."), *with Kauffman*, 415 at 997 ("We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule."). As a result, servicemembers seeking to challenge collaterally a court-martial conviction face a confusing patchwork of obscure and often inconsistent tests, with materially disparate results.

The court of appeals' decision here compounds the confusion by holding, based on *dicta* in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), that yet another standard of review – one even more deferential, and even more impenetrable, than *Burns* – applies to *non-habeas* collateral attacks. *See United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 406 (D.C. Cir. 2006), Pet. App. 4a-5a. But there is no principled

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[2] Note, *Civilian Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1262 (1969). *See also* Maj. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5, 7 (1985) ("The [*Burns*] Court ... provided little direction for applying [the] 'full and fair' consideration test, causing considerable confusion among the lower federal courts.").

reason to review differently convictions where the servicemember is not or is no longer in custody, since sentences such as the bad-conduct discharge at issue here have stigmatizing and deeply harmful effects that follow the ex-servicemember throughout the rest of his or her life. Moreover, the court of appeals' decision misreads *Councilman* to require a standard that the court itself "ha[d] serious doubt whether the judicial mind is really capable of applying." *Id.* at 408. The decision thus exemplifies the confusion that *Burns* continues to engender in the lower courts – a confusion that *Councilman*, with its cryptic *dicta* and uncertain relationship to *Burns*, exacerbates.

The members of the United States armed services and those subject to the military justice system[3] deserve reasonable clarity on an issue on which their fundamental liberties, reputations, and ability to participate fully in society may ultimately rest.[4] NIMJ is concerned solely with the adverse systemic implications of the decision below as it relates to the standard of review of collateral attacks on military convictions, and takes no position on the underlying merits of petitioner's claims. In view of the undesirable, widespread implications of the decision below, NIMJ urges this Court to grant the petition and clarify the standard of review by adopting the test articulated by the D.C. Circuit in *Kauffman*, 415 F.2d at 997, which should apply to both habeas and non-habeas collateral attacks.

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[3] In addition to the more than two million active duty personnel, certain categories of retired and reserve personnel, members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces, military prisoners, prisoners of war, and, in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field also are subject to trial by court martial. 10 U.S.C. § 802(a) (as amended by Pub. L. No. 109-364, § 552, 120 Stat. 2083 (2006)).

[4] Collateral attack is, as a practical matter, generally the only available avenue for review of military convictions by Art. III courts, though this Court may review by certiorari cases where CAAF has granted review. 10 U.S.C. § 867a(a).

STATEMENT

In 1995, petitioner New, a medical specialist in the United States Army, was court martialed and charged with violating Article 92(2) of the Uniform Code of Military Justice (codified at 10 U.S.C. § 892(2)), which provides that any person who, "having knowledge of any ... lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order ... shall be punished as a court-martial may direct." *New*, 448 F.3d at 405, Pet. App. 2a.

New had refused to obey an order to add United Nations insignia—a shoulder patch and a field cap—to his uniform in preparation for deployment to Macedonia. *Id.* New contended that the order was unlawful "on various statutory and constitutional grounds." *New*, 448 F.3d at 405, Pet. App. 3a.

The court martial convicted New and sentenced him to a bad-conduct discharge. *Id.* The Army Court of Criminal Appeals affirmed. *Id.*

CAAF granted review, noting in its decision: "This case involves some of the most difficult choices that may confront our Government and our men and women in uniform." *United States v. New*, 55 M.J. 95, 100 (2001) ("CAAF Op."), Pet. App. 63a. "Military personnel are obligated to obey lawful orders and regulations.... The term 'lawful' recognizes the right to challenge the validity of a regulation or order with respect to a superior source of law." CAAF Op., 55 M.J. at 100 (citing 10 U.S.C. §§ 890, 891 & 892), Pet. App. 64a. If New thought the orders unlawful, he "had to decide whether he should voice his opposition to those decisions, how to do so, and whether to obey orders that he viewed as unlawful." CAAF Op., 55 M.J. at 100, Pet. App. 63a.

Before CAAF, New contended that his court martial conviction should be reversed because, inter alia, his Fifth Amendment rights were violated when the military judge decided the lawfulness of the order – assertedly an element of 10 U.S.C. § 892(2) – without submitting it to the members ("military jury"). *Id.*, Pet. App. 63a-64a.

CAAF upheld New's conviction, in a decision that produced four opinions from among the five-member panel.

The CAAF majority recognized that "the case before us represents the first time, subsequent to [*United States v.*] *Gaudin*, [515 U.S. 506 (1995),] that we must answer the question whether lawfulness is an element that must be submitted to the members," CAAF Op., 55 M.J. at 102, Pet. App. 67a-68a, and that "[t]here are respectable arguments on both sides of the question." CAAF Op., 55 M.J. at 100, Pet. App. 64a. The majority held that "[i]n light of the legislative history of the [Uniform] Code [of Military Justice] and the Manual [for Courts-Martial]," lawfulness was not an element. CAAF Op., 55 M.J. at 105, Pet. App. 74a.

Judge Sullivan sharply rejected this view: "[A] military accused has a codal and constitutional right to have the members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense of which he is charged." CAAF Op., 55 M.J. at 118 (Sullivan, J., concurring in result), Pet. App. 103a. He protested that "the majority characterizes the lawfulness of an order as mere 'surplusage' and judicially eliminates it as an essential element of a disobedience offense," contrary to "the traditional Anglo-American view that only the disobedience of 'lawful' orders is prohibited." CAAF Op., 55 M.J. at 115, Pet. App. 95a. "I strongly disagree with this radical departure from our political, legal, and military tradition." *Id.*

Following the exhaustion of his direct appeals, New sought to collaterally attack his conviction in the United States District Court for the District of Columbia. *See United States ex rel. New v. Rumsfeld*, 350 F. Supp. 2d 80 (D.D.C. 2004). New sought a declaration that his court-martial conviction was null and void because it was obtained in violation of his constitutional rights. *Id.* at 87, Pet. App. 22a.

After noting that the scope of review applicable to New's claims was "a matter that demands some clarification," *New*, 350 F. Supp. 2d at 89, Pet. App. 26a, and "the

circuits have arrived at a variety of interpretations," *id.*, the district court granted the government's Rule 12(b)(6) motion to dismiss. *New*, 350 F. Supp. 2d at 102; Pet. App. 52a-53a.

The Court of Appeals for the D.C. Circuit affirmed. *New*, 448 F.3d at 405; Pet. App. 1a. The court recognized that the threshold question of the standard of review was a "tangled" issue. *New*, 448 F.3d at 406, Pet. App. 4a. Because New was not in custody, the court concluded that the habeas corpus standard did not apply, even though "New, the government, and the district court ha[d] all assumed that jurisdiction rests on 28 U.S.C. § 2241." *Id.*

Based on *Councilman*, the court held "that collateral relief was barred unless the judgment[was] 'void,'" which required an analysis of successive levels of comparative deference: "The Supreme Court pitched the *Councilman* standard as more deferential than habeas review of military judgments, which it has in turn described as no less deferential than habeas review of state court judgments." *New*, 448 F.3d at 406-07, Pet. App. 4a-6a. The court, however, conceded that this multi-tiered standard was too uncertain to actually guide its analysis. *New*, 448 F.3d at 408, Pet. App. 7a. Accordingly, it applied a compromise guideline that did not provide the protections set forth in *Kauffman*:

> It suffices for our purposes to repeat *Councilman*'s statement that errors must be fundamental to void a court-martial judgment on collateral review. And in light of *Councilman*'s point that non-habeas review is if anything more deferential than habeas review of military judgments, a military court's judgment clearly will not suffer such a defect if it satisfies *Burns*'s "fair consideration" test.

Id. (citations omitted).

Employing this standard, the court of appeals refrained from fully considering the constitutional issues on the merits, but, instead, merely recapitulated the bases for CAAF's rulings and concluded there was no "fundamental defect" in the present case, *New*, 448 F.3d at 408-11, Pet. App. 7a-14a,

"even though [the military court's] application might be highly contestable in another context." *New*, 448 F.3d at 411, Pet. App. 13a. Had the court applied the *Kauffman* test, it would have conducted its own independent analysis to determine whether CAAF's rulings were consistent with the Constitution, and, if not, whether the peculiarities of military life justified a departure from the constitutional standard. *Kauffman*, 415 F.2d at 997. Instead, it simply deferred.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THE STANDARD OF REVIEW FOR COLLATERAL ATTACKS ON COURT-MARTIAL CONVICTIONS ALONG THE LINES SET FORTH IN *KAUFFMAN*.

A. *Burns* Has Engendered Confusion

In *Burns*, a plurality of this Court defined the scope of review in collateral attacks on court-martial convictions as "whether the military have given fair consideration to each of [the petitioner's] claims." *Burns*, 346 U.S. at 144. *See also id.* at 142 ("[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.").

The lower federal courts have struggled for fifty years to distill from the Court's "full and fair consideration" standard a workable and meaningful test. The result has been widespread confusion and widely divergent interpretations. Indeed, as one commentator observed less than a decade after *Burns*, "[t]reating the principal opinion in the *Burns* case as the controlling precedent, a court may simply and summarily dismiss a petition on the ground that the military did not refuse to consider [the petitioner's] allegations or it may, with equal ease and upon the same authority, stress the requirement that military consideration shall have been full and fair." Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61

Colum. L. Rev. 40, 59 (1961). *See also* Maj. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5, 7 (1985) (after *Burns*, lower courts have taken "diverse approaches to constitutional challenges to military convictions, ranging from strict refusal to review issues considered by the military courts to *de novo* review of constitutional claims").

As a result of these differing standards, "the scope of review accorded a claim will be dependent upon the particular district or circuit in which the claimant files his petition. In habeas corpus cases, this situs will be the district or circuit in which the claimant, through no fault of his own, happens to be confined." *Id.* at 8.[5]

There are presently five principal, but conflicting, formulations of the "full and fair consideration" standard.

1. The D.C. Circuit held in *Kauffman* that the "full and fair consideration" standard requires a court to determine whether the court-martial complied with prevailing standards of constitutional due process as enunciated by this Court, "unless it is shown that conditions peculiar to military life require a different rule." 415 F.2d at 997. The *Kauffman* test precludes review of a court-martial's factual findings. *Id.*

2. The Fifth Circuit held in *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975), that the "full and fair consideration" test requires a court to determine whether: (1) the asserted error was of substantial constitutional dimension; (2) the asserted error was one of law rather than of disputed fact already determined by the tribunal; (3) military considerations warrant different treatment of constitutional claims; and (4) the tribunal gave adequate consideration to the issues

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[5] In most cases, this will be the United States District Court for the District of Kansas and the Tenth Circuit, respectively, because the United States Disciplinary Barracks at Fort Leavenworth is located there. *Id.* at 60 n.345; *see also* Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L. Rev. 1, 16 (1994) (discussing the importance of Tenth Circuit's interpretation of *Burns* in military death penalty cases).

involved and applied the proper legal standard to the issue. The *Calley* standard limits review to "questions of law which present constitutional issues." *Id.* at 203.[6]

3. The Federal Circuit held in *Bowling v. United States*, 713 F.2d 1558, 1561 (Fed. Cir. 1983), that while questions of fact resolved by military courts cannot be collaterally attacked, allegations of "serious" constitutional violations, i.e., those that "demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process," may be reviewed. The Federal Court of Claims subsequently construed the *Bowling* test as providing that courts "may only review those court-martial matters in which the plaintiff alleges and proves that: (1) significant constitutional defects have deprived the plaintiff of due process; (2) fundamental fairness was lacking in the court-martial proceeding; and (3) the review does not simply amount to a retrying or reweighing of the evidence." *Matias v. United States*, 19 Cl. Ct. 635, 642 (1990) (citing *Bowling*, 713 F.2d 1560-61). *See also, e.g., Moore v. United States*, 61 Fed. Cl. 146, 150-51 (2004); *Madsen v. United States*, 48 Fed. Cl. 464, 468 (2000).

4. Recognizing the confusion *Burns* has engendered and declining to "attempt any further explication of *Burns*," the Third Circuit recently applied the standard of review for state habeas, as it is articulated in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254:

> Whatever *Burns* means, we have no doubt that at least absent a challenge to the constitutionality of the statute under which the defendant was convicted ... our inquiry in a military habeas case may not go further than our inquiry in a state habeas case. Thus, we will assume – *but solely for the sake of argument* – that we may review determinations made by the military courts in this case as if they

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[6] In *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Tenth Circuit adopted the *Calley* test.

> were determinations made by state courts. Accordingly, we will assume that 28 U.S.C. § 2254(e)(1) applies to findings of historical fact made by the military courts.... In considering other determinations made by the military courts, we will assume that 28 U.S.C. § 2254(d) applies.

Brosius, 278 F.3d at 245.

5. The Sixth Circuit has given the "full and fair consideration" test an exceedingly narrow interpretation, essentially limiting it to the question of whether the court-martial tribunal physically listened to the petitioner's claims. *See Witham v. United States*, 355 F.3d 501, 503-05 (6th Cir. 2004) (noting the Court of Criminal Appeals had considered the claims raised by the petitioner and holding that "[w]here there is no colorable jurisdictional question, a finding of full and fair consideration ends our habeas corpus inquiry").

B. The Court Should Clarify *Burns* By Adopting The *Kauffman* Test

To clarify the *Burns* "full and fair consideration" test, this Court should adopt the *Kauffman* test, which is the clearest, most principled, and most workable articulation of the *Burns* standard. Three main reasons support its adoption.

1. The *Kauffman* test is clear and simple in its basic outlines. A court need only determine whether the court martial complied with existing due process standards, as articulated by this Court. If so, the inquiry is at end. If not, the court determines whether conditions peculiar to military life justify the military court's application of a different rule, drawing upon this Court's substantial body of case law on the interplay between the Bill of Rights and the demands of military life. *See, e.g., Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *see also* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962).

In contrast to the relative simplicity of the *Kauffman* test, the *Calley* test, for example, requires courts to conduct a multi-pronged inquiry into whether (1) the asserted error was of substantial constitutional dimension, (2) the asserted error

was one of law rather than of disputed fact already determined by the tribunal, (3) military considerations warrant different treatment of constitutional claims, and (4) the tribunal gave adequate consideration to the issues involved and applied the proper legal standard. *Calley*, 519 F.2d at 199-203. In addition to being more cumbersome, *Calley* is confusing because it includes the *Burns* test as one of its four prongs and does not specify whether the prongs are factors to be balanced against one another or conditions that must all be satisfied.[7] Moreover, the factors vest considerable discretion in the district court with little guidance. *See Dodson*, 917 F.2d at 1253 ("these factors still place a large amount of discretion in the hands of the federal courts").

2. The *Kauffman* test also has the advantage of making explicit that United States servicemembers are presumptively entitled to the same protections of the United States Constitution as their fellow citizens, unless there is an articulated military need to depart from these constitutional standards. *Kauffman* thus ensures that the constitutional rights of servicemembers will be protected while simultaneously affording appropriate consideration of the necessities of military life and deference to court-martial proceedings.

As the *Burns* plurality recognized, several interests are at stake in collateral proceedings attacking a court-martial conviction. On the one hand, "[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Burns*, 346 U.S. at 142. Collateral review exists in part to ensure that these responsibilities are discharged. On the other hand, *Burns* recognized the unique nature of military life, *see id.* at 140 ("[T]he rights of men in the armed

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[7] Courts have taken both approaches. *Compare Khan v. Hart*, 943 F.2d 1261, 1263 (10th Cir. 1991) (weighing factors against one another and "strik[ing] the balance in favor of review") *with Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1993) ("[R]eview by a federal district court of a military conviction is appropriate only if the following four conditions are met").

forces must perforce be conditioned to meet certain overriding demands of discipline and duty"), *see also Parker*, 417 U.S. at 743 ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."), as well as the need for some level of deference to court-martial proceedings. *Burns*, 346 U.S. at 142.

The *Kauffman* test, more so than the *Calley*, *Bowling*, and *Brosius* tests, balances these interests. On the one hand, the *Kauffman* test ensures that the rights of servicemembers will be protected by guaranteeing that court-martial proceedings comply with this Court's due process standards. On the other hand, the *Kauffman* test recognizes the unique nature of military life by providing that court-martial proceedings may depart from this Court's due process standards where the peculiar nature of military life requires it. Finally, by deferring to the court-martial tribunal's factual findings, the *Kauffman* test comports with *Burns*' mandate that "it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Burns*, 346 U.S. at 142.

Neither the Federal Circuit's *Bowling* test nor AEDPA review as embraced in *Brosius* achieves the careful balancing of interests that the *Kauffman* test does. Although *Bowling* offers similar protections to servicemembers' constitutional rights, it fails to expressly allow that the necessities of military life may require a different constitutional rule. *Brosius* suffers from a similar infirmity. AEDPA accords a court-martial tribunal's conclusions of law some deference, but nothing in AEDPA permits a court to tailor the applicable constitutional rule to the unique circumstances of military life. Instead, the only inquiry is whether the decision of the court-martial tribunal was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Brosius*, 278 F.3d at 245 (quoting 28 U.S.C. § 2254(d)(1)). Thus, the *Kauffman* test better addresses the unique interests at stake in collateral attacks on court-martial proceedings.

3. The *Kauffman* test is not pegged to the standard of review in state habeas, and thus does not fluctuate depending on whatever standard of review happens to prevail in state habeas. In contrast, the tests articulated by a number of the other circuits are often expressly framed in relation to the standard of review in state habeas. *See, e.g.*, *Brosius*, 278 F.3d at 245 ("Whatever *Burns* means, we have no doubt that ... our inquiry in a military habeas case may not go further than our inquiry in a state habeas case."); *Calley*, 519 F.2d at 203 ("The scope of review for violations of constitutional rights ... is more narrow than in civil cases."); *cf. New*, 448 F.3d at 407 ("As the military habeas standard of review at one time followed review of state court judgments toward *less* deference, perhaps it (and other collateral review of military decisions) should follow the current path toward *more*."). The *Kauffman* test affords a level of certainty absent from these other tests, which are subject to continual recalibration in light of changes in state habeas.

To be sure, *Burns* established a comparative standard of review for collateral attacks on court-martial convictions that is more deferential than that employed to resolve attacks on state-court convictions. *See Burns*, 346 U.S. at 139. But fidelity to the *Burns* plurality is unwarranted here, because *Burns* was simply wrong when it declared that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases," *id.*, as recognized at the time by Justice Frankfurter in his dissent from denial of rehearing, *Burns*, 346 U.S. at 846, and numerous commentators since. *See, e.g.*, John K. Chapman, Note, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 Vand. L. Rev. 1387, 1389, 1417-19 (2004); Note, *Civilian Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1273 (1969). The scope of federal habeas review of both state court and military convictions was identical until shortly before *Burns*, *see* Chapman, 57 Vand. L. Rev. at 1389, and federal habeas review of state convictions

did not exist at all until 1867, whereas federal habeas review of military convictions had been available since 1789.[8]

II. *COUNCILMAN* DOES NOT ESTABLISH A SEPARATE STANDARD OF REVIEW FOR NON-HABEAS COLLATERAL ATTACKS.

That the D.C. Circuit eschewed the *Burns* test because the petitioner was not in custody, and instead applied a standard of review it derived from admitted *dicta* in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), represents an additional reason to grant the petition. The relationship between *Burns* and *Councilman* has long divided the courts, and the decision below exacerbates this confusion. The standard of review in collateral attacks on court-martial convictions ought not to turn on whether the petitioner was sentenced to confinement or is still in custody when the petition is considered. *Councilman* does not require such a distinction, which ignores or unduly minimizes the stigmatizing and long-term, harmful effects of court-martial convictions that result "only" in punitive separation from the armed services.[9]

1. *Councilman* did not involve a collateral attack on a military conviction. Rather, it involved a servicemember's attempt to prospectively enjoin a *pending* court-martial on the grounds that the offense at issue allegedly fell outside the military court's jurisdiction. 420 U.S. at 739-40. *Councilman* should be read in this factual context. Indeed, this Court recently construed *Councilman* as an abstention case primarily concerned with principles of comity. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2770 (2006).

2. *Councilman* does not establish a separate standard of review for non-habeas collateral attacks. Rather, it holds that

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[8] *Compare* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82, *with* Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385.

[9] A punitive discharge is one of nine types of authorized punishment. MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 1003 (2005). There are three types of punitive discharge: (a) dismissal, (b) dishonorable discharge, and (c) bad-conduct discharge. *Id.* at R.C.M. 1003(b)(8).

(1) enactment of Art. 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876,[10] did not remove the federal courts' traditional jurisdiction to hear non-habeas collateral attacks on court-martial convictions, *Councilman*, 420 U.S. at 744-45, and (2) as a matter of equitable doctrine, federal courts must refrain from intervening in pending court-martial proceedings when the defendant servicemember can show no harm other than the attendant resolution of his or her case in the military court system. *Id.* at 758. Neither holding purports to alter or in any way affect the standard of review articulated in *Burns*. Indeed, because the Court concluded that abstention was appropriate, *Councilman* does not apply any standard of review at all to the substantive claims.

Accordingly, in the thirty years since *Councilman*, many courts have continued to apply the *Burns* test to non-habeas collateral attacks – just as, prior to *Burns*, courts had applied the same test to habeas and non-habeas collateral attacks. Indeed, the case law of the Federal Circuit and the Court of Federal Claims is confined to non-habeas collateral attacks – mostly suits for backpay and reinstatement.[11] Yet, since *Councilman*, those courts have largely applied the *Burns* standard, as interpreted by *Bowling*. *See, e.g.*, *Matias v. United States*, 923 F.2d 821, 826 (Fed. Cir. 1990) (applying *Burns* and *Bowling*); *Moore*, 61 Fed. Cl. at 150 ("plaintiff must show ... that the military courts failed to give fair con-

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[10] Art. 76 provides in relevant part that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter ... are final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all ... courts ... of the United States." 10 U.S.C. § 876.

[11] Under 28 U.S.C. § 1295(a)(2), the Federal Circuit has jurisdiction over appeals from the district courts in certain backpay suits (under $10,000) brought pursuant to 28 U.S.C. § 1346(a)(2). The Federal Circuit's jurisdiction also extends to appeals from the Court of Federal Claims, 28 U.S.C. § 1295(a)(3), which has jurisdiction to hear certain claims against the United States, including those involving backpay, restoration of service, and correction of records. *See* 28 U.S.C. § 1491.

sideration to the claim") (internal quotations omitted); *Longval v. United States*, 41 Fed. Cl. 291, 295 (1998) (same).

3. *Councilman*, however, does contain some language, which the court below recognized was *dicta*, 448 F.3d at 406, Pet. App. 4a, that could be understood to conflict with *Burns* and that has caused confusion in the courts:

> A judgment ... is not rendered void merely by error, nor does the granting of collateral relief necessarily mean that the judgment is invalid for all purposes. On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief....

Id. at 747

> [T]he question whether a court-martial judgment properly may be deemed void – i.e., without res judicata effect for purposes of the matter at hand – may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress.

Id. at 753. *Councilman* also observes that "the grounds upon which military judgments may be impeached collaterally are not necessarily invariable" and "[f]or example, grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief." *Id.*

This "fundamental defect" test figured in the Court's analysis only as a brief elucidation of what makes a judgment "void" for purposes of a collateral attack, such that the Article III courts have subject matter jurisdiction. *Id.* at 746-747. That this is not meant to supplant *Burns*' standard of review is clear from the sentence that follows the Court's discussion of the "fundamental defect" test: "But we are concerned here

only with petitioner's broad jurisdictional argument, which we reject for the reasons stated above." *Id.* at 753. Under the circumstances, *Councilman*'s brief reference to "fundamental defect[s]" should not be read to require the far-reaching changes in the *Burns* standard the D.C. Circuit here adopted.

The court of appeals appears to have been the first to decide that *Councilman* established a separate standard of review for non-habeas collateral attacks. However, the court below was not alone in its uncertainty regarding *Councilman*'s implications for *Burns*. While many courts have ignored the "fundamental defect" test, applying the "full and fair consideration" standard instead, *see, e.g.*, *Mendrano v. Smith*, 797 F.2d 1538, 1541-42 (10th Cir. 1986) (citing *Burns* but not *Councilman*), other courts have attempted to reconcile *Councilman* with *Burns* in one of two ways.

Some courts have combined *Burns* and *Councilman* to formulate a single test. For instance, in *Calley*, the court summarized its interpretation of *Burns* as follows:

> Military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so *fundamentally defective* as to result in a miscarriage of justice.

Calley, 519 F.2d at 203 (emphasis added).

Other courts have interpreted the "fundamental defect" test as a threshold jurisdictional inquiry that, if satisfied, sets the stage for review under the *Burns* standard. *See, e.g.*, *Hatheway v. Sec'y of Army*, 641 F.2d 1376, 1379-80 (9th Cir. 1981); *Priest v. Sec'y of Navy*, 570 F.2d 1013, 1016 (D.C. Cir. 1977). In this view, *Councilman* articulates the jurisdictional pleading standard that plaintiffs must satisfy in order to obtain collateral review. *See id.* ("We conclude that if Priest's interpretation of the First Amendment is correct, the

defect in the court-martial judgment caused by improper instructions would be sufficiently fundamental to void it.").

4. At least in the absence of some statutory bar, there is no principled reason to distinguish the standard of review applicable to habeas and non-habeas collateral attacks on military convictions. Such a distinction ignores or minimizes the stigmatizing and harmful effects of any court-martial conviction, including one that does not result in confinement. As this Court has recognized, these grave, non-confinement consequences include "deprivation of pay and earned promotion, and even ... discharge or dismissal ... under conditions that can cause lasting, serious harm in civilian life." *Councilman*, 420 U.S. at 752. Indeed, a servicemember convicted by court martial may also suffer "collateral civil disabilities," including restrictions on the right to vote, purchase or own firearms, parental rights, and public employment eligibility. Maj. Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, 2001-Dec. Army Law 1, 8-11 (2001).

A punitive discharge is a serious matter that can be the equivalent of a felony conviction, *see* MANUAL FOR COURTS MARTIAL at R.C.M. 1003(b)(8)(B), and is profoundly stigmatizing. As the D.C. Circuit observed in *Kauffman*, "'In terms of its effects on reputation, the stigma experienced by the recipient of a discharge under other than honorable conditions is very akin to the concept of infamy.'" 415 F.2d at 995 (quoting Everett, *Military Administrative Discharges – The Pendulum Swings*, 1966 Duke L. J. 41, 50).

In addition, a court-martial conviction resulting in a punitive discharge can have deeply debilitating economic consequences for the servicemember and his or her dependents, such as loss of veterans' retirement and medical benefits. *See* Walker, *supra*, 2001-Dec. Army Law at 8-11. Equally grave, the soldier may face severely curtailed employment opportunities in the civilian sector. *See, e.g., Kaiser v. Sec'y of the Navy*, 525 F. Supp. 1226, 1228 (D. Colo. 1981) ("Among the serious collateral, non-imprisonment consequences of a court-martial conviction are the lifelong social

and psychological stigma and greatly limited employment opportunities"); Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 Harv. Black-Letter J. 221, 238 (1991) (adverse effects on future employment); Charles P. Sandel, Comment, *Other-Than-Honorable Military Administrative Discharges: Time for Confrontation*, 21 San Diego L. Rev. 839, 847 (1984) (significant stigma and restriction of employment opportunities).

Applying a different, more deferential standard of review to non-habeas collateral attacks on court-martial convictions ignores these grave effects based on a factor bearing no relationship to the severity of the alleged constitutional defect. *Cf. Kauffman*, 415 F.2d at 996 ("To hold that collateral review is contingent on confinement in every case would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offense, the punishment, and the violation of the serviceman's [sic] rights.").

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted.

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